Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

KEVIN M. O'GILVIE and STEPHANIE L. O'GILVIE, minors,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether a punitive damages award received in a personal injury lawsuit is excludable from gross income as "any damages received . . . on account of personal injuries . . ." under 26 U.S.C. § 104(a)(2)?

II. What is the date on which the two-year statute of limitations under 26 U.S.C. § 6532(b) commences to run for the United States to file a lawsuit against a taxpayer as allowed under 26 U.S.C. § 7405(b)?

LIST OF ALL PARTIES TO THE PROCEEDINGS

Kevin M. O'Gilvie and Stephanie L. O'Gilvie, minors, by and through INTRUST Bank, NA (formerly The First National Bank in Wichita), Conservator.

RULE 29.6 LISTING

Petitioners' Conservator, INTRUST Bank, NA, is a wholly owned subsidiary of INTRUST Financial Corp., formerly First Bancorp of Kansas, Inc.

TABLE OF CONTENTS

Contents

Contents

TABLE OF CITATIONS

Cases Cited:

Contents

Contents

Contents

Contents

OPINIONS BELOW

Kelly M. O'Gilvie v. United States, 66 F.3d 1550 (10th Cir. 1995), reproduced herein as Appendix A; *Kelly M. O'Gilvie v. United States*, No. 90-1075-B Civ. (D. Kan. Aug. 26, 1992), 92-2 USTC ¶ 50,567, reproduced herein as Appendix C; and *Kelly M. O'Gilvie v. United States*, No. 90-1075-B Civ. (D. Kan. May 26, 1992), 92-2 USTC ¶ 50,344, reproduced herein as Appendix D.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on September 19, 1995, and is reproduced as Appendix B herein. This Court has jurisdiction to issue the requested writ of certiorari under 28 U.S.C. § 1254(1).

The United States filed a complaint in the United States District Court for the District of Kansas, seeking to recover federal income tax refunds that had been paid to INTRUST Bank, NA, as Conservator of Kevin M. O'Gilvie and Stephanie L. O'Gilvie. The district court had jurisdiction under 28 U.S.C. § 1345.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. Section 61(a) of the Internal Revenue Code of 1986, 26 U.S.C. § 61(a)[1], provides in relevant part:

1. Unless otherwise stated, all section references are to the Internal Revenue Code, Title 26, United States Code, as in effect for the taxable year at issue.

GENERAL DEFINITION - Except as otherwise provided in this subtitle, gross income means all income from whatever source derived . . . .

2. Section 104(a) of the Internal Revenue Code of 1986, 26 U.S.C. § 104(a), provides in relevant part:

IN GENERAL - Except in the case of amounts attributable to (and not in excess of) deductions allowed under section 213 (relating to medical, etc., expenses) for any prior taxable year, gross income does not include —

* * *

(2) The amount of any damages received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal injuries or sickness.

3. Section 1.104-1(c) of the Treasury Regulations, 26 C.F.R. § 1.104-1(c), (as amended in 1970), provides:

Section 104(a)(2) [of the Internal Revenue Code] excludes from gross income the amount of any damages received (whether by suit or agreement) on account of personal injuries or sickness. The term "damages received (whether by suit or agreement)" means an amount received (other than workmen's compensation) through prosecution of a legal suit or action based upon tort or tort type rights, or through a settlement agreement entered into in lieu of such prosecution.

4. Section 6532(b) of the Internal Revenue Code of 1986, 26 U.S.C. § 6532(b), provides:

SUITS BY UNITED STATES FOR RECOVERY OF ERRONEOUS REFUND —Recovery of an erroneous refund by suit under section 7405 shall be allowed only if such suit is begun within 2 years after the making of such refund, except that such suit may be brought at any time within 5 years from the making of the refund if it appears that any part of the refund was induced by fraud or misrepresentation of a material fact.

5. Section 7405 of the Internal Revenue Code of 1986, 26 U.S.C. § 7405, provides in relevant part:

(a) REFUNDS AFTER LIMITATION PERIOD—Any portion of a tax imposed by this title, refund of which is erroneously made, within the meaning of section 6514, may be recovered by civil action brought in the name of the United States.

(b) REFUNDS OTHERWISE ERRONEOUS —Any portion of a tax imposed by this title which has been erroneously refunded (if such refund would not be considered as erroneous under section 6514) may be recovered by civil action brought in the name of the United States.

* * *

(d) PERIODS OF LIMITATION —

For periods of limitations on actions under this section, see section 6532(b).

STATEMENT OF THE CASE

A. Factual Background

The Petitioners in this case are Kevin M. O'Gilvie and Stephanie L. O'Gilvie (sometimes hereinafter referred to as "the O'Gilvie children"). The O'Gilvie children are the minor children of Betty O'Gilvie, who died April 2, 1983, of toxic shock syndrome. (App. 3, 28a). INTRUST Bank, NA is the conservator for each of the O'Gilvie children. Kelly M. O'Gilvie, the husband of Betty O'Gilvie, acting as administrator of her estate and as guardian of the O'Gilvie children brought a product liability suit against International Playtex, Inc., the manufacturer of tampons used by Betty O'Gilvie. (App. 3a). The jury awarded actual damages of $1,525,000 and punitive damages of $10,000,000. (App. 3a).

In 1988, the Estate of Betty O'Gilvie received the proceeds of the punitive damages award, totaling, net of attorney's fees and expenses, $4,967,292. (App. 3a). The conservator, on behalf of the O'Gilvie children, reported and paid tax on their shares of the punitive damages on their individual federal income tax returns for 1988, the year the funds were distributed by the estate to the conservator.

In August 1989, Kelly O'Gilvie filed a claim for refund with respect to his 1988 income taxes, asserting that punitive damages were excluded from his gross income under 26 U.S.C. § 104(a)(2) as damages received "on account of personal injury." When the Internal Revenue Service took no

action on his refund claim he filed suit against the United States to recover the refund plus interest. The parties filed cross-motions for summary judgment, each asserting there was no genuine issue of material fact and that the taxability of punitive damages could be decided as a matter of law. (App. 4a).

In November 1989, the O'Gilvie children each filed a claim for refund stating that the punitive damages award was excluded from gross income under 26 U.S.C. § 104(a)(2) as damages received "on account of personal injury." (App. 4a). After obtaining Congressional approval as required by 26 U.S.C. § 6405, the Internal Revenue Service processed the refund claims. (App. 4a). On July 9, 1990, the Conservator received in the mail, from the United States Treasury, two checks, each in the amount of $392,160.37, representing the federal income tax refund claimed by each of the O'Gilvie children, plus interest. Each check bears an issue date of July 6, 1990.

On July 9, 1992, the Internal Revenue Service filed its complaint herein against the O'Gilvie children, seeking unde 26 U.S.C. § 7405 to recover as erroneously made the refu..us that had been paid to them, asserting that the punitive damages award was taxable. On August 20, 1993, in accordance with an agreement entered into by INTRUST Bank, NA, as conservator of the O'Gilvie children, and the United States, the district court entered a Stipulation and Order, reproduced as Appendix E herein, paragraphs 10 and 14 of which provide as follows:

> 10. The legal issues in this case are identical to the legal issues in the case of *Kelly O'Gilvie v. United States*, Civil No. 90-1075-B (D. Kan.), and the parties to this

> litigation therefore agree to be bound by the final judgment of the district court in *Kelly O'Gilvie v. United States*, Civil No. 90-1075-B (D. Kan.) (subject to the provisions contained in paragraphs 13 and 14 below). (App. 39a)
>
> * * *
>
> 14. Both parties reserve the right to appeal any adverse determination on the merits in this case.

(App. 39a).

B. Proceedings Below

On May 26, 1992, the district court issued a memorandum and order, Appendix D herein, holding that the punitive damages received by Kelly O'Gilvie were taxable. (App. 36a). However, on that same date the United States Supreme Court issued its opinion in *United States v. Burke*, 112 S. Ct. 1867 (1992). In view of the *Burke* decision, Kelly O'Gilvie moved for reconsideration of the decision against him. (App. 25a). On August 26, 1992, the district court granted Kelly O'Gilvie's motion and reversed its May 26, 1992, decision, holding that the punitive damages were excludable from his gross income under 26 U.S.C. § 104(a)(2). (App. 27a). The district court granted summary judgment for Kelly O'Gilvie, and, pursuant to the Stipulation and Order, Appendix E herein, also granted summary judgment to the O'Gilvie children on the punitive damages issue.

The United States appealed the district court decision and the Court of Appeals for the Tenth Circuit reversed and held:

> A. That the punitive damages award is not excludible from gross income under 26 U.S.C. § 104(a)(2) (App. 22a); and
>
> B. That the two-year statute of limitations of 26 U.S.C. § 6532(b) began to run on July 9, 1990, when the O'Gilvie children received their refund checks, and thus the filing of the lawsuit by the United States against them, on July 9, 1992, for recovery of erroneous refunds pursuant to 26 U.S.C. § 7405(b), was timely. (App. 10a).

REASONS FOR GRANTING THE WRIT

A. Excludability of Punitive Damages Under 26 U.S.C. § 104(a)(2)

The United States Supreme Court has never considered the taxability of punitive damages under 26 U.S.C. § 104(a)(2)[2], and there is a conflict among the lower courts on this issue. The Tenth Circuit's decision in this case, as well as the Ninth Circuit's decision in *Hawkins v. United States*, 30 F.3d 1077 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 2576 (1995), the Fifth Circuit's decisions in *Wesson v. United States*, 48 F.3d 894 (5th Cir. 1995) and *Robinson v. Commissioner*, __ F.3d __, No. 94-41023, 1995 U.S. App. Lexis 33759 (5th Cir. Dec. 5, 1995), the Fourth Circuit's decision in *Miller v. Commissioner*, 914 F.2d 586 (4th Cir. 1990), and the Federal Circuit's decision in *Reese v. United States*, 24 F.3d 228 (Fed. Cir. 1994), squarely conflict with the Sixth Circuit's decision in *Horton v. Commissioner*, 33 F.3d 625 (6th Cir. 1994). In addition, the present case, *Hawkins*, *Miller*, *Wesson*, *Robinson* and *Reese* are in conflict with the nearly unanimous holdings

2. This Court has considered the taxability of punitive damages arising out of an antitrust violation. *Commissioner v. Glenshaw Glass Company*, 75 S. Ct. 473 (1955).

of the United States Tax Court in *Miller v. Commissioner,* 93 T.C. 330 (1989), *rev'd,* 914 F.2d 586 (4th Cir. 1990) and *Horton v. Commissioner,* 100 T.C. 93 (1993), *aff'd,* 33 F.3d 625 (6th Cir. 1994), and with the Tax Court's Decision in *Robinson v. Commissioner,* 102 T.C. 116 (1994), *rev'd,* __ F.3d __, No. 94-41023, 1995 U.S. App. Lexis 33759 (5th Cir. Dec. 5, 1995). While *Miller* has been reversed by the Fourth Circuit, and *Robinson* reversed by the Fifth Circuit, the Sixth Circuit affirmed the Tax Court in *Horton,* thus making it unlikely that the Tax Court will alter its position. This lack of uniformity throughout the judicial system with respect to an important provision of the Internal Revenue Code ought not to be allowed. Resolution of these conflicts are necessary to prevent taxpayers from being subject to federal taxation, or not, depending upon the happenstance of their place of residence.

The interpretation placed by the Fourth, Fifth, Tenth and Federal Circuits on 26 U.S.C. § 104(a)(2) also renders meaningless the 1989 statutory amendment to that section. This change provided that the exclusion of § 104(a)(2) does not apply to punitive damages not involving physical injury or sickness.

Additionally, the interpretation of 26 U.S.C. § 104(a)(2) is of continuing importance. Fairness, completeness, and judicial economy requires resolution of the conflicts presented here.

B. Statute of Limitations

In holding that the United States timely filed its complaint herein against the O'Gilvie children, the Tenth Circuit failed to follow the holding in *United States v. Wurts,* 58 S. Ct. 637 (1938), this Court's only case involving § 610 of the Revenue Act of 1928 (Revenue Act of 1928, chap. 852, 45 Stat. at L. 791, § 610, 26 U.S.C. § 1646) or its successor 26 U.S.C. § 6532(b); relying instead upon erroneously decided lower court decisions.

DISCUSSION

I.

TAXABILITY OF A PUNITIVE DAMAGES AWARD RECEIVED IN A PERSONAL INJURY LAWSUIT

A. The Decision of the Tenth Circuit Squarely Conflicts with Decisions from the Sixth Circuit and the Tax Court

The Tenth Circuit's decision in this case, as well as the decisions of the Ninth Circuit in *Hawkins, supra*; the Fifth Circuit in *Wesson, supra,* and *Robinson, supra*; the Fourth Circuit in *Miller, supra*; and the Federal Circuit in *Reese, supra,* squarely conflict with the Sixth Circuit's decision in *Horton, supra,* and two nearly unanimous opinions of the United States Tax Court sitting *en banc. See Miller v. Commissioner,* 93 T.C. 330, 338 (1989), *rev'd,* 914 F.2d 586 (4th Cir. 1990) (15 to 2 decision); *Horton v. Commissioner,* 100 T.C. 93, 95 (1993), *aff'd,* 33 F.3d 625 (6th Cir. 1994) (16 to 3 decision expressly rejecting the reasoning and holding of the Fourth Circuit in *Miller*). The courts of appeals decisions also conflict with *Robinson v. Commissioner,* 102 T.C. 116 (1994), *rev'd,* ___ F.3d ___, No. 94-41023, 1995 U.S. App. Lexis 33759 (5th Cir. Dec. 5, 1995).

This Court's recent decision in *Commissioner v. Schleier,* 115 S. Ct. 2159 (1995), did not address the taxability of punitive damages and, thus, did not resolve the conflict between the circuits. The practical import of this lack of consensus will remain evident. In cases arising in the Fourth, Fifth, Ninth, Tenth and Federal Circuits, the District Courts

and Tax Court will be compelled to follow the rule that punitive damages in connection with personal injury claims are not excluded from gross income. In all other circuits, including the Sixth, the District Courts and Tax Court will apply the contrary rule.[3] Immediate resolution of this conflict between the courts of appeals, and between several of the courts of appeals and the Tax Court, is necessary to prevent taxpayers in different circuits from being subject to disparate federal tax treatment.

There is no possibility that this conflict will ameliorate of its own accord. Its existence was brought to the attention of the Ninth Circuit in *Hawkins*. *Hawkins*, 30 F.3d at 1084 (Trott, J. dissenting). The Sixth Circuit in *Horton* was similarly cognizant of the split, yet specifically refused to follow the Ninth Circuit, the Fourth Circuit, and the Federal Circuit. *Horton*, 33 F.3d at 628.The Fourth Circuit decision in *Miller*, the Federal Circuit's decision in *Reese*, the Fifth Circuit's decision in *Wesson* and the Ninth Circuit's decision in *Hawkins* are final, as is the Sixth Circuit's decision in *Horton*.

B. The Decision of this Court in *Burke* and *Schleier* are Distinguishable as Not Involving Personal Injuries

The recent decisions of this Court in *Burke*, *supra*, and *Schleier*, *supra*, do not address the issue presented in the case at hand, namely, whether a punitive damages award received in a personal injury lawsuit is received "on account of" personal injuries. Neither *Burke* nor *Schleier* involved

3. The Tax Court considered the Fourth Circuit's reversal in *Miller* yet hewed to its reasoning when revisiting the issue in *Horton*. Now that the Tax Court's approach has been confirmed by the Sixth Circuit, there can be little doubt that the Tax Court will continue to recognize the excludability of punitive damages received in personal injury suits in all circuits in which it has the authority to do so, i.e., everywhere outside of the Fourth, Fifth, Ninth, Tenth and Federal Circuits.

personal injuries in which there was a claim that was based upon tort or tort type rights and in which the recovery was received on account of personal injury or sickness.

In *Burke*, the plaintiff had received a payment in settlement of a back pay claim under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 Stat. § 2000e *et seq.*, and sought exclusion of the amount from gross income under 26 U.S.C. § 104(a)(2), as "damages received . . . on account of personal injuries." *Burke*, 112 S. Ct. at 1869. In determining if the settlement was excluded this Court observed that "[n]either the text nor the legislative history of § 104(a)(2) offers any explanation of the term 'personal injuries.' " *Id.* at 1870. However, the Court noted that since 1960, Internal Revenue Service regulations have formally linked identification of a personal injury for 26 U.S.C. § 104(a)(2) purposes to traditional tort principles. *Id.* at 1870 (quoting 25 Fed. Reg. 11490 (1960)); 26 C.F.R. § 1.104-1(c) (as amended in 1970). Further, this Court noted that in *Threlkeld v. Commissioner*, 87 T.C. 1294 (1986), *aff'd*, 848 F.2d 81 (6th Cir. 1988), the United States Tax Court stated "common law tort law concepts are helpful in deciding whether a taxpayer is being compensated for a 'personal injury.' " *Id.* at 1305.

In reviewing common law tort concepts this Court observed that "[a] tort has been defined broadly as a 'civil wrong,' other than breach of contract, for which the court will provide a remedy in the form of an action for damages." *Id.* at 1871. *See* W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser & Keeton on the Law of Torts* 2 (5th ed. 1984).

Thus, the Court in *Burke* held that a "personal injury" as used in 26 U.S.C. § 104(a)(2) is one that must be based on tort or tort type rights, which, as stated in *Schleier* requires "the

availability of compensatory remedies." *Schleier*, 115 S. Ct. at 2166. *Burke* did not address the issue of punitive damages, as no punitive damages were awarded.

Schleier addressed the issue of whether a recovery of back pay and liquidated damages from the settlement of a claim under the Age Discrimination in Employment Act of 1967 is excluded from gross income pursuant to 26 U.S.C. § 104(a)(2). The Court examined Schleier's claim that the liquidated damage portion of the settlement was excluded from gross income under 26 U.S.C. § 104(a)(2) and, in concluding that it was not stated:

> [T]he plain language of § 104(a)(2), the text of the applicable regulation, and our decision in *Burke* establish two independent requirements that a taxpayer must meet before a recovery may be excluded under § 104(a)(2). First, the taxpayer must demonstrate that the underlying cause of action giving rise to the recovery is "based upon tort or tort type rights"; and second, the taxpayer must show that the damages were received "on account of personal injuries or sickness."

Id. at 2167.

Although *Schleier* sets forth the test that must be met in order to exclude the recovery under 26 U.S.C. § 104(a)(2), the Court found that the injury suffered by Schleier was not the type that allows exclusion under 26 U.S.C. § 104(a)(2), and therefore, did not discuss the taxability of punitive damages in a personal injury context. The issue of taxability of punitive damages under 26 U.S.C. § 104(a)(2) was not addressed by the

Court in *Schleier*, nor did it need to in order for the Court to decide that case. Since *Schleier* did not address this issue, the meaning of "on account of" in personal injury lawsuits remains unanswered.[4]

C. The Tenth Circuit's Opinion is Inconsistent with the 1989 Amendment of 26 U.S.C. § 104(a)(2)

The Tenth Circuit, although stating it is "troubled by the language of the 1989 amendment," found that punitive damages received in a personal injury lawsuit were not received "on account of" personal injuries. (App. 19a). This concern over the 1989 amendment is well founded since the Tenth Circuit's holding renders the amendment meaningless.

In 1989, Congress amended 26 U.S.C. § 104(a)(2) to provide that the provision's exclusion "shall not apply to any punitive damages in connection with a case not involving physical injury or physical sickness." Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, § 7641, 103 Stat. 2106, 2379 (1989). However, this amendment does not apply to any recovery of punitive damages under an agreement made, or pursuant to a lawsuit filed, on or before July 10, 1989. *Id.* The reasonable implication from the 1989 amendment is that, as to recoveries on lawsuits filed or agreements made prior to July 10, 1989, all punitive damages on account of personal injury were not taxable; as to recoveries on lawsuits filed or agreements made after July 10, 1989, only punitive damages received in cases involving physical injury or sickness are excludable. *See also Burke*, 112 S. Ct. at 1871 n.6 ("Congress amended § 104(a) to allow the

4. *Schleier* does set out a hypothetical example of the tax treatment of the damages in a case involving personal injury arising out of an automobile accident. The example does not, however, contain a punitive damages award. *Schleier*, 115 S. Ct. at 2163-64.

exclusion of *punitive* damages only in cases involving 'physical injury or physical sickness.' ") (emphasis in original).

The 1989 amendment makes no sense — and has no effect —if it is read any way other than as above. In other words, since punitive damages in a case not involving physical injury or physical sickness are singled out as being includable in gross income, the clear implication of Congress' chosen wording is that punitive damages in a case involving physical injury is excludable, and was excludable even before the amendment. *See Horton*, 33 F.3d at 631 n.12; *Hawkins*, 30 F.3d at 1086-87 (Trott, J., dissenting) (stating that if punitive damages were taxable before and after the amendment, as Ninth Circuit majority held, the amendment was meaningless because punitive damages were already taxable).

It offends common sense to construe this amendment in any other fashion, for "if Congress wanted to clarify that all punitive damages were taxable, why did the amendment create a distinction between physical and nonphysical injury?" *Hawkins*, 30 F.3d 1077, 1086-87 (Trott, J., dissenting). In short, the 1989 amendment is further evidence that punitive damages obtained in all personal injury suits were excludable from gross income prior to 1989.

D. Punitive Damages Paid to a Person Sustaining a Personal Injury Are "On Account Of" the Injury

With this background, the Tenth Circuit found the language ambiguous and susceptible of at least two meanings:

> [T]he language "on account of" [may] describe a causal relationship between damages and injury according to which damages are received "on account of" a personal injury whenever a showing of personal injury is a prerequisite for the award of those damages. In other words, any damages ultimately received in a case involving personal injury are damages received "on account of" that personal injury. [Another interpretation is] one which defines a causal relationship according to which damages are received "on account of" personal injuries only when the injury in and of itself justifies such damages. Under [this] interpretation, punitive damages are not encompassed by the exclusion, because those damages are received, not because of a personal injury, but in large part "on account of" a defendant's egregious conduct and the jury's desire to punish and deter such conduct.

(App. 17a) (quoting *Reese*, 24 F.3d at 230-31).[5] *See also Wesson*, 48 F.3d at 898; *Reese*, 24 F.3d at 230, *Hawkins*, 30 F.3d at 1080; *Miller*, 914 F.2d at 589-90.

On the other hand, the Sixth Circuit did not find any ambiguity, in holding that the plaintiffs' damages — compensatory and punitive — were received "on account of" their personal injuries. In so holding, the court stated that the

5. Similarly, *Miller* explained that "on account of" suggests causation, but that causation could be either "but-for causation" — *i.e.*, the plaintiff would not have recovered punitives but for the injury, or it could be "sufficient causation" — *e.g.*, personal injury alone does not sustain a punitive damages award, a plaintiff must also show egregious conduct. *Miller*, 914 F.2d at 589-90.

"plain meaning of the broad statutory language [of section 104(a)(2)] simply does not permit a distinction between punitive and compensatory damages." *Horton*, 33 F.3d at 631.

Punitive damages in a personal injury case are excludable for the same reason that lost wages are excludable in a personal injury case. *Schleier*, discusses the lost wages question. 115 S. Ct. at 2164. It is "on account of" the personal injury that the lost wages or punitive damages are received in such a case. If it were not for the personal injury, the plaintiff would not have received the lost wages award or the punitive damages award. Therefore, the lost wages and punitive damages must be "on account of" the personal injury. They are not "on account of" anything else.

It has been argued that punitive damages in a personal injury case may be "on account of" the jury's desire to punish the tortfeasor for willful, wanton or flagrant conduct and to deter such conduct in the future, rather than to compensate the injured party. *See Reese*, 24 F.3d at 230-31. But that does not explain why the plaintiff should receive such damages. The law could just as well provide that any punitive damages be paid to the state or to a victims' fund, rather than to the plaintiff. So why does the law provide that punitive damages be paid to the plaintiff rather than to the state or to a victims' fund? Because the plaintiff has sustained a personal injury. Therefore, the punitive damages are "on account of" the personal injury.

E. The Tenth Circuit's Approach Disregards the Rationale and Plain Language of the Statute

In its opinion, the Tenth Circuit states that the rationale supporting 26 U.S.C. § 104(a)(2), namely the principle that damages received through litigation should not be taxed when

they make the taxpayer whole is "somewhat problematic."[6] (App. 19a). The Tenth Circuit is "further troubled by the language of the 1989 amendment to § 104(a)(2);" (App. 19a) and claims that *Horton* is "flaw[ed]." (App. 15a).

Having found fault with the reasons propounded for not excluding punitive damages from taxation, the Tenth Circuit found itself fast running out of reasons to justify a holding that a punitive damages award received "on account of" personal injuries should not be excluded from taxable income. So, the court turns to the only remaining argument, that being that exclusions from income are narrowly construed. (App. 22a). But, in so holding, the Tenth Circuit states:

> In sum, it is not clear whether Congress intended to exclude punitive damages from income under § 104(a)(2). Although "good reasons tug each way" in this case, we need not decide "which tug harder," because we must follow the default rule that exclusions from income are narrowly construed. *Burke* [92-1 USTC ¶50,254], 504 U.S. at 248 (Souter, J., concurring). We thus join the majority of the circuits that have addressed this issue in holding that § 104(a)(2) does not exclude punitive damages from income.

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6. The return of capital theory has been widely criticized elsewhere as a means of explaining the 26 U.S.C. § 104(a)(2) exclusion. *See, e.g.*, *Downey v. Commission*, 97 T.C. 150, 159, (1991), *supplemental opinion*, 100 T.C. 634 (1993), *rev'd on other grounds*, 33 F.3d 836, *cert. denied*, 115 S. Ct. 2576 (1995); Cochran, *1989 Tax Act Compounds Confusion over Tax Status of Personal Injury Damages*, 49 Tax Notes 1565, 1573 (1990); Henning, *Recent Developments in the Tax Treatment of Personal Injury and Punitive Damage Recoveries*, 45 Tax Law, 783, 796 (1992); Henry, *Torts and Taxes, Taxes and Torts: The Taxation of Personal Injury Recoveries*, 23 Hous. L. Rev. 701, 725 (1986).

(App. 22a). However, the court's holding leaves unresolved the meaning of "on account of personal injuries."

Further, this holding abandons the language of the statute in favor of a policy rationale that has been discredited.[7] Section 104(a)(2) provides that gross income does not include "*any* damages received . . . on account of personal injuries or sickness"[8] (emphasis added). The plain meaning of 26 U.S.C. § 104(a)(2) is that "*any*" damages, that is *all* damages, received on account of personal injury are excluded from gross income. *See Crane v. Commissioner*, 67 S. Ct. 1047, 1051 (1947) ("the words of statutes — including revenue acts — should be interpreted where possible in their ordinary, everyday senses").

F. The Issue Presented is One of Continuing Importance

The interpretation of pre-amendment 26 U.S.C. § 104(a)(2) "remains one of substantial importance in the

7. In *Hawkins*, 30 F.3d 1077, 1087-88 (Trott, J., dissenting), Judge Trott stated that the majority tries to impose some logic and common sense on 26 U.S.C. § 104(a)(2). "Despite their efforts, I fear they might sow more confusion than clarification. Congress should straighten out this mess, but until they do, we must do our best to apply the statute as it is written and as we believe Congress intended. We cannot contradict the statute's plain language in an effort to impose order in the sometimes-chaotic world of the tax code." *Id.*

8. In *Hawkins*, 30 F.3d at 1080 n. 2, the majority noted that over the last 30 years, the Internal Revenue Service has twice reversed its opinion on whether 26 U.S.C. § 104(a)(2) excludes punitive damages awarded in a personal injury suit. *Compare* Rev. Rul. 58-418, 1958-2 C.B. 18 (1958) (punitives awarded in a libel suit not excludable) *with* Rev. Rul. 75-45, 1975-1 C.B. 47 (1975) (any damages, whether compensatory or punitive, received on account of personal injuries or sickness are excludable) and Rev. Rul. 84-108, 1984-2 C.B. 32 (1984) (punitive damages in a wrongful death suit must be included in gross income).

administration of the income tax laws for earlier taxable years." *Colony Inc. v. Commissioner*, 78 S. Ct. 1033, 1035 (1958); *see also Watson v. Commissioner*, 73 S. Ct. 848 (1953) (*cert. granted* to resolve conflicting constructions of amended provisions of Internal Revenue Code because of significance for earlier taxable years). The 1989 amendment does not apply to recoveries of punitive damages in connection with lawsuits filed before July 10, 1989. Many such lawsuits may still be pending, or recoveries thereon subject to audit for years to come. Given the frequency of punitive damages awards, the resolution of the circuit split at bar has potential ramifications for untold numbers of taxpayers. *Cf. Pacific Mut. Life Ins. Co. v. Haslip*, 111 S. Ct. 1032, 1066 (1991) (O'Connor, J., dissenting) (citations omitted) ("Recent years . . . have witnessed an explosion in the frequency and size of punitive damages awards. . . . A recent study by the RAND Corporation found that punitive damages were assessed against one of every ten defendants who were found liable for compensatory damages in California").

Moreover, this Court's decision in *Schleier, supra*, did not address the issue of the taxability of punitive damages awarded "on account of personal injuries." Accordingly, the issue of whether, under the pre-1989 amendment language of 26 U.S.C. § 104(a)(2), the test for exclusion from gross income is the nature of the action (is it a tort type suit?) or the nature of the remedy (does it serve a compensatory or punitive purpose?) remains unanswered.

Finally, the meaning of the phrase "damages received . . . on account of personal injuries," as used in 26 U.S.C. § 104(a)(2), has important, continuing ramifications as to the proper tax treatment of punitive damages received in connection with agreements made or suits filed after July 10, 1989, in cases involving physical injury. Resolution of the

proper application of 26 U.S.C. § 104(a)(2) to punitive damages awards in the present case would be determinative for punitive damages awards in all physical injury cases both before and after 1989. The proper application of 26 U.S.C. § 104(a)(2) to punitive damages awards represents a frequently recurring issue on which the courts of appeals have divided.

II.

STATUTE OF LIMITATIONS UNDER 26 U.S.C. § 6532(b)

If the United States believes that it made an erroneous refund to a taxpayer, a lawsuit may be filed to recover the refund, but "only if such suit is begun within two years after the making of such refund. . . ." 26 U.S.C. § 6532(b). The question then is when does the "making" of a refund occur in the context of a mailed check.

A. The Court of Appeals Decision Did Not Follow this Court's Decision in *Wurts*

The court of appeals decision in this case did not follow the only decision of this Court which involves § 610 of the Revenue Act of 1928 or its successor, 26 U.S.C. § 6532(b). This Court in *Wurts* held that the statute "begins to run from the date of payment." *Wurts*, 58 S. Ct. at 639. There was no mention in that case of a date of delivery, receipt by the taxpayer, or any other such date, other than the date the refund check was mailed. Therefore, this Court could only have meant in *Wurts* that the two-year period commences on the date that the Internal Revenue Service places the refund check in the mail addressed to the taxpayer.

In the present case, the refund checks had to have been mailed no later than Sunday, July 8, 1990, in order for the conservator to have received them in the mail on Monday, July 9, 1990. Since the Complaint herein was not filed until July 9, 1992, this suit was begun more than two years after the making (mailing) of the refund, and recovery herein by the government is therefore barred under 26 U.S.C. § 6532(b) and *Wurts*.

B. The Court of Appeals Misconstrued the Statutory Language

Under the statutory language, the start of the two-year limitations period is not triggered by an event involving the taxpayer. Instead, it is clear from the language used in 26 U.S.C. § 6532(b) that the period commences upon an act which is solely within the control of the Internal Revenue Service (the "making" of the refund). It is submitted that the Internal Revenue Service "makes" a refund when a refund check is signed and deposited with the postal authorities addressed to the taxpayer. At that point there is nothing further to be done by the Internal Revenue Service in order for the Internal Revenue Service to have "made" the refund.

Congress' choice of words in 26 U.S.C. § 6532(b) is crucial to its application. Congress did not provide that the statutory trigger is "the payment of such refund." Such language would arguably have been more consistent with the holding of the Ninth Circuit in *United States v. Carter*, 907 F.2d 1375 (9th Cir. 1990), and the Tenth Circuit in this case. The term "payment" implies that the presumed obligation to the payee has been satisfied; *i.e.*, that the payee has received such satisfaction. Instead, Congress chose the term "making," which requires the opposite conclusion; that is, that the payee is not involved in the act which triggers the two-year period. Again, only the Internal Revenue Service is necessary to the

"making" of a refund, whereas "payment" of a refund might be more susceptible to the construction that it involves not only the "making" of the refund but also its receipt by the taxpayer. In other words, the term "payment" may include the occurrence of receipt by the payee, while the term "making" certainly does not. Since 26 U.S.C. § 6532(b) uses "making" it can only mean, in *Carter* and in the present case, that the two-year period for filing a lawsuit begins when the Internal Revenue Service completes the last act required of it in order for the refund to be "made" — the placing of the check in the mail. Therefore, both cases were erroneously decided.

The Tenth Circuit in this case found that the term "made" must mean received by the taxpayer because until receipt by the taxpayer, payment on the check could be canceled or stopped, so the refund is not made until that window of opportunity has passed. This argument must fail because the courts in *United States v. Woodmansee*, 388 F. Supp. 36 (N.D. Cal. 1975), *rev'd on other grounds*, 578 F.2d 1302 (9th Cir., 1978), and *United States v. Bruce*, 642 F. Supp. 120 (S.D. Tex. 1986) have specifically held that the limitation period commences no later than the date of receipt by the taxpayer, not later when the taxpayer cashes the check. They so held even though the Internal Revenue Service could, theoretically, stop payment on the check after the taxpayer receives it and even up to the time it works its way back through the banking system to the Treasury.

C. Summary of Case Law Addressing Statute of Limitations

The relevant cases on this issue may be summarized as follows:

- *Paulson v. United States,*[9] 78 F.2d 97 (10th Cir. 1935) and *United States v. Fairbanks,*[10] 925 F.2d 794 (9th Cir. 1938), *cert. denied*, 59 S. Ct. 66 (1939).

  The taxpayers in these cases argued that because the complaints were filed more than two years after the refunds were "approved" by the Internal Revenue Service, but less than two years after the refund checks were "delivered", the actions were time-barred. How and when the checks were "delivered" (in person, by mail, etc.) was not stated.

  Held: Recovery was not time-barred.

- *Holden v. United States,*[11] 78 F.2d 97 (10th Cir. 1935).

  The complaint was filed more than two years after the refund was "approved", but less than two years after the refund check was both issued by the Internal Revenue Service and "delivered" to the taxpayer. How and when the check was "delivered" was not stated.

  Held: Recovery was not time-barred.

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9. The issue in *Paulson, Fairbanks, Holden* and *Wurts* involved § 610 of the Revenue Act of 1928, the predecessor of 26 U.S.C. § 6532(b), barring the United States from recovering an erroneous tax refund unless a lawsuit is brought within two years after the making of the refund.

10. *See* Footnote 9, *supra.*

11. *See* Footnote 9, *supra.*

- *United States v. Wurts*,[12] *supra*.

  The complaint was filed more than two years after the refund was "approved", but less than two years after the refund check was mailed.

  Held: Recovery was not time-barred.

- *Woodmansee*, *supra*, and *Bruce*, *supra*.

  The complaints were filed more than two years after the refund checks were both mailed by the Internal Revenue Service and received by the taxpayers, but less than two years after the taxpayers cashed or deposited the refund checks.

  Held: Recovery was time-barred.

- *Akers v. United States*, 541 F. Supp. 65 (M.D. Tenn. 1981).

  The erroneous refund was recovered by the Internal Revenue Service more than two years after the date on the refund check, but less than two years after it was mailed.

  Held: Recovery was not time-barred.

- *Carter*, *supra*, and the Tenth Circuit decision in this case.

12. *See* Footnote 9, *supra*.

  The complaints were filed more than two years after the refund checks were mailed by the Internal Revenue Service, but less than two years after they were received by the respective taxpayers.

  Held: Recovery was not time-barred.

D. None of the Cited Cases Are Proper Precedent for this Case, Except *Wurts*

From this summary it can be seen that all of the cases except *Wurts* and *Carter* present substantially different facts and different legal issues than does this case. Those cases therefore do not provide precedent for this case. *Wurts* and *Carter* are the two cases which most nearly resemble this case factually and which squarely present the issue herein. The Ninth Circuit in *Carter* erroneously relied on the *Paulson*, *Woodmansee* and *Akers* cases, rather than on *Wurts*. Not only were those three cases readily distinguishable on their facts, but the *Carter* court relied on language from those cases which was unnecessary to the decisions therein. Because of the substantially different facts, *Carter's* reliance on the unnecessary holdings from those three opinions is misplaced.

The extraneous and unnecessary holding from *Paulson*, *supra*, was that "the date a refund was made . . . was the date of receipt. . . ." (App. 9a). If the check in *Paulson* was personally delivered to the taxpayer, then the Internal Revenue Services' release of the check and the taxpayer's receipt would have been simultaneous on March 19, 1929, the date it was "delivered," according to the decision. If the delivery was in-person delivery, then *Paulson* has no possible application in this case or the *Carter* case, because here and in *Carter* the time differential between the release of the refund by the

Internal Revenue Service and the receipt by taxpayer is the crux of the entire case.

If the refund check in *Paulson* was mailed, then any holding from that case is still extraneous and irrelevant because there was no indication in that case of the date of mailing. The check might have been mailed (if it was mailed) on March 18 to reach the taxpayer on the 19th, and if so, the lawsuit was still timely filed and the decision was correct whether the limitations period is triggered by the mailing or by the receipt by the taxpayer. In any event, the *Paulson* case was meaningless to *Carter* and is meaningless to this case.

Carter relied on *Woodmansee* for the proposition that a refund is considered to have been made on the date the taxpayer received the refund check. That reliance is misplaced because, as shown above, in *Woodmansee* the lawsuit was filed more than two years after both the mailing and the receipt. Thus, the holding in *Woodmansee* could just as well have been that the date of mailing is the start of the two-year period, and it would still have been correct. Again, *Carter's* reliance on *Woodmansee* was erroneous.

Carter relied on *Akers* for the same proposition (date of receipt by the taxpayer controls). But *Akers*, in turn, erroneously relied on *Paulson* and *Woodmansee* for that proposition. Furthermore, *Akers* could just as well stand for the proposition that the date of mailing controls, because in that case the recovery of the erroneous refund was obtained by the Internal Revenue Service within two years of both the date of mailing and the date of receipt.

In summary, the court of appeals in this case failed to follow the precedent set by this Court in *Wurts* and instead relied on *Carter*. The *Carter* decision was erroneously based

on extraneous and unnecessary language or holdings in *Paulson*, *Woodmansee* and *Akers*, which cases have no relevance to the issue in *Carter* nor to the issue in this case.

An interpretation of what constitutes the "making" of a refund under 26 U.S.C. § 6532(b), consistent with this Court's holding in *Wurts*, is necessary to provide fairness and certainty to taxpayers.

CONCLUSION

The petition for a writ of certiorari should be granted since the Tenth Circuit's decision in this case is in direct conflict with the Sixth Circuit and the Tax Court with respect to the taxation of punitive damages arising out of a personal injury. Further, this Court has never addressed the issue of taxability of punitive damages awards received on account of personal injuries. Additionally, the 1989 amendment to 26 U.S.C. § 104(a)(2) has important ramifications for tax treatment of punitive damages awards, both before and after the statutory amendment. Finally, the Tenth Circuit failed to follow the only decision of this Court involving 26 U.S.C. § 6532(b) or its predecessor.

Respectfully submitted,

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APPENDIX A — TENTH CIRCUIT COURT OF APPEALS, OPINION ENTERED SEPTEMBER 19, 1995 IN *O'GILVIE V. UNITED STATES*

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 94-3004
& 94-3031

KELLY M. O'GILVIE,

Plaintiff-Appellant/
Cross-Appellee,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee/
Cross-Appellant.

No. 94-3058

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

KEVIN M. O'GILVIE, STEPHANIE L. O'GILVIE,

Defendants-Appellees.

Appeals from the United States District Court
for the District of Kansas
(D.C. Nos. 90-CV-1075 and 92-1358-MLB)

Kenneth W. Rosenberg, Attorney, Tax Division (Loretta C. Argrett, Assistant Attorney General, and Kenneth L. Greene, Attorney, Tax Division, Of Counsel: Randall K. Rathbun, United States Attorney, with him on the briefs), Department of Justice, Washington, D.C., for the United States.

Linda D. King of Wilkinson & King, Wichita, Kansas, for the O'Gilvies.

Before MOORE and LOGAN, Circuit Judges, and DAUGHERTY, District Judge.*

LOGAN, Circuit Judge.

The substantive issue raised in these consolidated appeals is whether punitive damages recovered in a case involving physical injury are excluded from gross income under § 104(a) (2) of the Internal Revenue Code (I.R.C.), 26 U.S.C. § 104 (a) (2), a question which has split the circuits four to one.[1] We must also decide three threshold questions relating to our appellate jurisdiction.

* The Honorable Frederick A. Daugherty, Senior United States District Judge, United States District Court for the Western, Eastern and Northern Districts of Oklahoma, sitting by designation.

1. *Compare Wesson v. United States*, 48 F.3d 894 (5th Cir. 1995); *Hawkins v. United States*, 30 F.3d 1077 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 2576 (1995); *Reese v. United States*, 24 F.3d 228 (Fed. Cir. 1994) and *Commissioner v. Miller*, 914 F.2d 586 (4th Cir. 1990) *with Horton v. Commissioner*, 33 F.3d 625, 630 (6th Cir. 1994).

I

The punitive damages that are the subject of these appeals were awarded in a products liability action filed after Betty O'Gilvie died of toxic shock syndrome. Her widower, Kelly M. O'Gilvie, acting as administrator of her estate and as guardian of their minor children, Kevin M. O'Gilvie and Stephanie L. O'Gilvie, brought suit against International Playtex, Inc., which manufactured the tampons used by Betty O'Gilvie. The jury awarded actual damages of $1,525,000 and punitive damages of $10,000,000. *See O'Gilvie v. International Playtex, Inc.*, 609 F. Supp. 817, 818 (D. Kan. 1985), *aff'd in part and rev'd in part*, 821 F.2d 1438 (10th Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988). The district court ordered a remittitur of the punitive award to $1,350,000, 609 F. Supp. at 819-20, but on appeal this court ordered reinstatement of the full punitive award, 821 F.2d at 1448-49.

In 1988, the O'Gilvie estate distributed the net proceeds of the punitive damages award to the beneficiaries, the taxpayers here. After attorney's fees and expenses the net proceeds were $4,967,292. Each of the three taxpayers reported their share of the punitive damages on their individual federal income tax returns for the 1988 tax year in the following amounts:

Kelly M. O'Gilvie	$2,483,646
Kevin M. O'Gilvie	$1,241,823
Stephanie L. O'Gilvie	$1,241,823

In August 1989, taxpayer Kelly M. O'Gilvie filed a claim for refund with respect to his 1988 income taxes, asserting that punitive damages were excluded from gross income under I.R.C. § 104(a)(2) as damages received "on account of personal

injury."[2] When the Internal Revenue Service took no action on his refund claim he filed suit against the United States to recover the refund plus interest. He later filed an amended complaint in his suit, adding a claim for the refund of taxes paid on interest on the portion of the punitive damages award that was the subject of the remittitur.[3] The parties filed cross-motions for summary judgment, each asserting there was no genuine issue of material fact and that the taxability of punitive damages could be decided as a matter of law.

In November 1989, taxpayers Kevin M. O'Gilvie and Stephanie L. O'Gilvie filed claims for refund asserting the punitives were excludable from income.[4] The IRS approved, and after submitting them to Congress as required for large refunds by I.R.C. § 6405, processed the refunds. Kevin and Stephanie received refund checks in July 1990. Two years later, however, the IRS filed an action against each of them for recovery of an erroneous refund under I.R.C. § 7405, asserting the punitive

2. He sought a refund of $695,421, the tax that resulted from including the punitive damages in income.

3. Kelly O'Gilvie had filed in February 1991 a second administrative claim for refund for the 1988 tax year. That claim asserted an overpayment of taxes for 1988 in addition to the overpayment previously claimed with respect to the punitive damages. The alleged additional overpayment arose from interest he received on the portion of the punitive damages award that was remitted by the district court but reinstated by our court. The additional overpayment claimed was the tax paid on interest received for the period between the entry of the district court's original judgment, which was for $1,350,000, and the judgment entered after the remand, which was in the amount of $10,000,000. The interest computed at the federal postjudgment rate pursuant to 28 U.S.C. § 1961 totalled $875,000. The claim sought a refund of $260,437 in taxes paid on that interest. The Internal Revenue Service took no action on that claim.

4. Kevin and Stephanie O'Gilvie each requested a refund of $346,319.

damages award was taxable. The parties in that case agreed to be bound by the decision in Kelly O'Gilvie's refund suit.

On May 26, 1992, the district court issued a memorandum and order in the refund suit, finding that the punitive damages were taxable. Kelly O'Gilvie moved for reconsideration of the district court's opinion, and on August 26, 1992, the district court reversed itself and entered a judgment holding that punitive damages were excludable from gross income under § 104 (a) (2). On October 26, 1992, the United States filed a notice of appeal to our court from the August 26 judgment.

On November 11, Kelly O'Gilvie filed a motion for summary judgment asserting that the interest on the portion of the punitive damages award that was the subject of the remittitur was excludable from income under § 104 (a) (2) as a matter of law. The United States opposed that motion, arguing that the interest was taxable and requesting summary judgment in its favor. Because of the remaining issue concerning taxability of the interest, on October 27, 1992, the district court entered an order withdrawing the August 26 judgment.[5] On November 30, 1993,

5. The district court order stated:

> On August 26, 1992, pursuant to a Memorandum and Order of even date, the court entered judgment in favor of the plaintiff on plaintiff's motion for summary judgment (Doc. 34). Since that time, it has been brought to the court's attention that there is an issue which was raised in the amended pretrial order filed April 23, 1992 (Doc. 25) which has not yet been fully briefed by the parties. Both parties desire to have the issue ruled upon before a final judgment is entered.

(Cont'd)

the district court issued a memorandum and order finding that the interest during the interim period was taxable, and granted the government summary judgment on that issue. On December 7, 1993, the district court entered an amended order stating:

> IT IS ORDERED AND ADJUDGED that pursuant to the Memorandum and Order filed and docketed on the 26th day of August, 1992, the motion for reconsideration filed by the plaintiff is granted and his motion for summary judgment is also granted; IT IS FURTHER ORDERED that pursuant to the Memorandum and Order filed and docketed on the 30th day of November, 1993, the motion for summary judgment filed by the defendant is granted and the Court holds that the "additional Amount" on $8.65 million from the date of the district court's entry of remittitur to the district court's entry of judgment in accordance with the Tenth Circuit's mandate was interest and is taxable as income.

U.S. App. 57.

(Cont'd)

> Accordingly, pursuant to Rule 60(a), Fed. R. Civ. P., the judgment entered on August 26, 1992 is hereby withdrawn, subject to reinstatement at the conclusion of the case.
>
> IT IS SO ORDERED.

U.S. APP. 46.

On January 5, 1994, Kelly O'Gilvie filed a timely notice of appeal (No. 94-3004). On February 1, 1994, the government filed its cross-appeal (No. 94-3031).[6]

II

Taxpayer Kelly O'Gilvie argues that we do not have subject matter jurisdiction over the government's cross-appeal in No. 94-3031 because the notice of appeal was not timely. Taxpayers Kevin and Stephanie O'Gilvie assert that we lack jurisdiction over the government's appeal in No. 94-3058 because the government's suit against them for erroneous refund was untimely and because federal courts do not have jurisdiction to review refunds that have been approved by the Joint Committee on Taxation under I.R.C. § 6405. We address these issues in turn.

A

When the United States is a party in a civil case, "the notice of appeal may be filed by any party within 60 days" after the date of entry of the judgment or order appealed from. Fed. R. App. P. 4(a) (1). The United States filed its notice of appeal more than sixty days after the district court entered its judgment of November 30, 1993, but less than sixty days after entry of the amended judgment of December 7, 1983. Thus, if the November 30 judgment was final and appealable the government's appeal was not timely; on the other hand, if the amended judgment of December 7 was the final and appealable order the government's appeal was timely.

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6. No. 94-3058 is the government's appeal from the district court order of February 22, 1994, dismissing the action for erroneous refund against Kevin and Stephanie O'Gilvie.

Taxpayer Kelly O'Gilvie asserts that the amended judgment of December 7 merely corrected a clerical error in the first judgment under Fed. R. Civ. P. 60(a), and thus the time to appeal ran from November 30, 1993. *See White v. Westrick*, 921 F.2d 784 (8th Cir. 1990). However, a careful reading of all of the memoranda, orders, and "judgments" entered in this case indicates that the October 27 order withdrew the August 26 judgment on the punitives issue. Thus the district court did not enter judgment on the punitive damages issue until December 7. The government's cross-appeal is timely.

B

Taxpayers Kevin O'Gilvie and Stephanie O'Gilvie argue that the government's complaint seeking recovery of refunds made to them was time-barred. "Recovery of an erroneous refund by suit under section 7405 shall be allowed only if such suit is begun within 2 years after the making of such refund." I.R.C. § 6532(b). The complaint filed on July 9, 1992, alleged that the IRS refunded the taxes at issue on July 9, 1990. Taxpayers admit that they received the refund checks in the mail on July 9, 1990, but argue that a refund is made for purposes of § 6532(b) when the check is mailed, rather than when it is received. Taxpayers assert that because the checks had to have been mailed before July 9, 1990, the suit was filed more than two years after the refund was made. The question thus is whether a refund is "made" under § 6532(b) when the check is mailed or when it is received.

Taxpayers cite *United States v. Steel Furniture Co.*, 74 F.2d 744 (6th Cir. 1935), for their assertion that § 6532(b) must be construed liberally in their favor. That case, however, construed the scope of the predecessor of § 7405, which was not a statute of limitations provision. In interpreting the predecessor to the statutory limitations provision in § 6532(b) the Supreme Court

stated that "[t]he Government's right to recover funds, from a person who received them by mistake and without right, is not barred unless Congress has 'clearly manifested its intention' to raise a statutory barrier." *United States v. Wurts*, 303 U.S. 414, 416 (1938). Further, generally statutes of limitations sought to be applied against the government are strictly construed in favor of the government. *See, e.g., Badaracco v. Commissioner*, 464 U.S. 386, 391 (1984).

Although we have not addressed the precise question whether a refund is "made" under the current § 6532(b) when the check is mailed or when it is received, in *Paulson v. United States*, 78 F.2d 97 (10th Cir. 1935), we held that the date a refund was made for purposes of the predecessor of § 6532(b) was the date of receipt rather than the date the Commissioner approved and signed the schedule of refunds. As we stated there,

> [T]he refund is made when the money is paid. Refund means to pay back, return, restore, make restitution. That is the ordinary and popular concept of the word, and in the absence of a contrary indication, it must be presumed that the Congress used it in that generally accepted sense. The return, restoration, and restitution of the money is made when the check in payment of the obligation is delivered.

Paulson, 78 F.2d at 99. Our *Paulson* decision is supported by *Wurts*, which stated that "[t]he Commissioner's signature on a schedule of overassessments does not finally establish a claimant's right to a refund . . . [because he could later] — even after a check was signed and mailed — cancel the payment." 303 U.S. at 417-18.

Taxpayers assert that if the date of mailing is in evidence, as it impliedly is here, that as between the date of mailing and the date of receipt, the date of mailing is the time from which the statute runs. But as we stated in *Paulson*, "[o]rdinarily a statute of limitation does not begin to run until a suit could be brought." 78 F.2d at 99. Here, the government could not have brought suit to recover the refund until the taxpayers had received the refund checks on July 9, 1990. Thus, the statute of limitations began to run on July 9, 1990, when taxpayers received their refund checks. *Paulson*, 78 F.2d at 99; *see United States v. Carter*, 906 F.2d 1375, 1377 (9th Cir. 1990) ("refund is considered to have been made on the date the taxpayer received the refund check"); *see also* 14 Jacob Mertens, Jr., *The Law of Federal Income Taxation* § 54(a).71 (rev. ed. 1993) (§ 7405 suit must be brought "within two years from the date of delivery of the refund check"); Michael I. Saltzman, *IRS Practice and Procedure* ¶ 14.08[2][g] at 14-60 (2d ed. 1991) (same). The government's complaint, filed exactly two years later, was timely.

C

Taxpayers Kevin and Stephanie O'Gilvie also assert that because their refunds were submitted to the Joint Committee on Taxation for approval under I.R.C. § 6405(a), the United States cannot seek judicial review. Section 6405(a) at that time provided

> [n]o refund or credit of any income . . . tax . . . in excess of $200,000 shall be made until after the expiration of 30 days from the date upon which a report giving the name of the person to whom the refund or credit is to be made, the amount of such refund or credit, and the summary of facts and the decision of the Secretary, is submitted to the Joint Committee on Taxation.[7]

Plaintiffs assert that judicial review of the Secretary's approved decision would usurp congressional legislative power.

We first note that under § 6405(a) the Joint Committee merely received a report of the refunds and did not object to them, thus the Committee did not affirmatively approve the refunds. *See Philadelphia & Reading Corp. v. Commissioner*, 944 F.2d 1063, 1067 (3d Cir. 1991) ("If the Joint Committee does not reject the refund [reported under § 6405(a)] within the thirty-day period, the IRS must then process the refund."). Once the IRS has submitted its report, summary of facts and decision of the Secretary to the Joint Committee on Taxation and that Committee has passed on the report, we see no constitutional or statutory impediment to judicial review of refunds. *Cf. Oxford Life Ins. Co. v. United States*, 574 F. Supp. 1417, 1428 (D. Ariz. 1983), *aff'd in part and rev'd in part on other grounds*, 790 F.2d 1370 (9th Cir. 1986) (holding that it could not rule on whether government was entitled to recover refund until after the IRS submitted its report, summary of facts and decision of Secretary to the Joint Committee on Taxation pursuant to 26 U.S.C. § 6405).

We believe that § 6405 was enacted so that the Committee could be involved in oversight of payments from the Treasury, not to prevent judicial review of refund decisions. As the government points out, if we were to accept taxpayers' argument, the government could never seek review of a refund that had been approved by the Committee. We hold that the district court had

7. A 1990 amendment increased the amount required to be submitted to the Joint Committee from $200,000 to $1,000,000, *see* Pub. L. No. 101-508, § 11834(a), 104 Stat. 1388, 1388-560 (1990).

jurisdiction to review the refund, and thus we have jurisdiction to review the district court's determination.

III

We now address the substantive issue whether punitive damages in a products liability action for wrongful death are excludable from gross income under § 104(a) (2). We review this issue of law de novo. *See Estate of Moore v. Commissioner*, 53 F.3d 712, 714 (5th Cir. 1995).

Section 61(a) of the Internal Revenue Code defines "gross income" broadly: "Except as otherwise provided in this subtitle, gross income means all income from whatever source derived." I.R.C. § 61(a). Thus, Congress intended to "tax all gains except those specifically exempted." *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426, 430 (1955). Plaintiffs assert that the punitive damages award in the instant case were excluded from gross income by I.R.C. § 104(a) (2), which provided:[8]

> § 104. Compensation for injuries or sickness
> . . . [G]ross income does not include —
>
> . . . .
>
> (2) the amount of any damages received (whether by suit or agreement and whether as

8. The language quoted is the version of the statute in effect at the time the punitives were awarded to the O'Gilvies, and thus it controls here. The statute was later amended, *see* Pub. L. No. 101-239, § 7641(a), 103 Stat. 2106, 2379 (1989). The text of this amendment is discussed *infra*.

> lump sums or as periodic payments) on account of personal injuries or sickness.[9]

Four Circuits have held that noncompensatory punitive damages are not received "on account of" personal injuries; therefore they are not excludable from gross income under § 104(a) (2). *See Wesson v. United States*, 48 F.3d 894 (5th Cir. 1995); *Hawkins v. United States*, 30 F.3d 1077 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 2576 (1995); *Reese v. United States*, 24 F.3d 228 (Fed. Cir. 1994); *Commissioner v. Miller*, 914 F.2d 586 (4th Cir. 1990). These decisions begin with the threshold determination that the language of § 104(a) (2), that gross income

9. The district court initially found that the punitive award did not fit the § 104(a)(2) exception, implicitly rejecting plaintiffs' assertion that the plainlanguage of the statute excludes any damages received as a result of the underlying personal injury lawsuit. The court thus found that the phrase "on account of" was ambiguous, and that the government's view that punitive damages are not awarded "on account of personal injury" was more reasonable when viewed in light of the statute's underlying purpose "to assist taxpayers burdened with sickness or injury and make them whole from a previous loss of personal rights." D.C. memo and order of May 26, 1992, U.S. App. 31 (citing *Commissioner v. Miller*, 914 F.2d 586 (4th Cir. 1990)). The district court determined that the punitive award was not received "on account of personal injury" and therefore was gross income.

The same day the district court issued its initial decision, the Supreme Court issued an opinion in *United States v. Burke*, 504 U.S. 229 (1995), which addressed whether settlement of a Title VII back pay claim was excludable under § 104 (a) (2). On plaintiff's motion for reconsideration, the district court determined that the *Burke* decision "altered the analysis" and required a reversal of its decision. D.C. memo and order of August 26, 1992, U.S. App. 42-44. It stated that "[i]n our previous order, this court focused on the nature of the punitive damage award itself, rather than the nature of the underlying claim. . . . The [*Burke*] opinion makes clear that the proper inquiry for purposes of § 104(a) (2) is on the nature of the claim underlying the taxpayers' damages award." *Id.* at 43. Because this is a tort-like suit, the court found that the punitive award was excludable from income under § 104 (a) (2) and granted plaintiff's motion for summary judgment.

does not include "the amount of any damages received . . . *on account of* personal injuries or sickness," is ambiguous. They then interpret the statute and determine that Congress intended to exclude only damages awarded to *compensate* for a tort-like injury, relying on some or all of the following: (1) the statutory context and title, (2) the principle that exclusions from income should be construed narrowly, (3) the policy and legislative history of § 104, (4) a Treasury Revenue Ruling addressing this issue, (5) the 1989 amendment to § 104(a) (2), and (6) Supreme Court cases discussing § 104(a) (2) in other contexts. Because punitive damages (generally) are not intended to compensate, but to deter and punish, these circuits conclude that § 104 (a) (2) does not exclude punitive damages from income.[10]

In contrast, the Sixth Circuit recently held that the plain language of § 104(a) (2) unambiguously exempts punitives from gross income, *see Horton v. Commissioner*, 33 F.3d 625, 630 (6th Cir. 1994). The *Horton* Court found that the "plain meaning of the broad statutory language [of § 104(a) (2)] simply does not permit a distinction between punitive and compensatory damages." *Id.* at 631 (citation omitted). That opinion relied on the Supreme Court's opinion in *United States v. Burke*, 504 U.S. 229 (1992).

The issue in *Burke* was whether a claim under Title VII of the Civil Rights Act of 1964 sought to redress "a personal injury" under § 104(a) (2). *Id.* at 237. The Court stated that the statute was ambiguous and the legislative history was not instructive. Therefore, the Court relied on the regulation relating to the statute, which defined "damages" as "an amount received . . . through prosecution of a legal suit or action based upon tort or tort

10. These courts looked to state law to determine whether punitives in each case were compensatory in nature, and found they were not. The O'Gilvies do not argue here that the punitives they received are compensatory in nature.

type rights." 26 C.F.R. § 1.104-1(c). The Court noted that under traditional tort law, a variety of remedies are available, including pain and suffering, emotional distress, harm to reputation, and punitive damages. Because Title VII does not provide these types of remedies; the Court concluded that a Title VII claim was not a type of personal injury claim.

Relying on *Burke*, the *Horton* opinion concluded that in determining whether an award is excludable under § 104(a) (2), it should focus exclusively " 'on the nature of the claim underlying [the taxpayer's] damages award.' " *Horton*, 33 F.3d at 631 (quoting *Burke*, 504 U.S. at 237). Further, it stated "[t]his is 'the beginning and end of the inquiry.' " *Horton*, 33 F.3d at 631 (citation omitted).[11]

The flaw in the *Horton* analysis is that *Burke* focused on the nature of the claim to determine if it involved a personal injury under § 104(a) (2); it did not address whether punitive damages were "received on account of" personal injuries or sickness and thus excludable under § 104(a) (2). *See Wesson*, 48 F.3d at 901. This view of *Burke* is supported by the recent opinion in *Commissioner v. Schleier*, 115 S. Ct. 2159 (1995).

Schleier addressed whether ADEA liquidated damages are excludable under § 104(a) (2), holding that they are not. The Supreme Court clarified that

11. The *Horton* court stated that because the taxpayer's claim was for a personal, physical injury, the entire recovery, including punitives, were received "on account of" their personal injuries. *Horton*, 33 F.3d at 631. It determined that the statute was not amenable to distinctions between punitive and compensatory damages. It also relied to some extent upon the fact that punitive damages in Kentucky serve a compensatory function. While superficially this appears to be a basis for distinguishing *Horton*, the Sixth Circuit broadly rejected the suggestion that even noncompensatory punitive damages should be included in gross income. *See id.* at 631-32.

> the plain language of § 104(a) (2), the text of the applicable regulation, and our decision in Burke establish two independent requirements that a taxpayer must meet before a recovery may be excluded under § 104(a)(2). First, the taxpayer must demonstrate that the underlying cause of action giving rise to the recovery is "based upon tort or tort type rights"; and second, the taxpayer must show that the damages were received "on account of personal injuries or sickness."

Id. at 2167. Thus *Schleier* made plain that *Horton*, and the district court in the instant case, misconstrued *Burke* as holding that § 104(a) (2) required *only* that there be a tort-type injury.[12]

Neither the *Burke* nor the *Schleier* Court addressed the question whether the phrase in § 104(a)(2) "on account of" personal injuries is ambiguous. With respect to this we agree with the four circuits that have found it is susceptible of at least two meanings:

> [T]he language "on account of" [may] describe a causal relationship between damages and injury according to which damage are received "on account of" a personal injury whenever a showing of personal injury is a pre-requisite for the

12. *Schleier* further aids our analysis by its statement that "each element of [a hypothetical] settlement is recoverable not simply because the taxpayer received a tort settlement, but rather because *each element* of the settlement satisfies the requirement . . . that the damages were received 'on account of personal injuries or sickness.' " *Schleier*, 115 S. Ct. at 2164 (emphasis added).

> award of those damages. In other words, any damages ultimately received in a case involving personal injury are damages received "on account of" that personal injury. [Another interpretation is] one which defines a causal relationship according to which damages are received "on account of" personal injuries only when the injury in and of itself justifies such damages. Under [this] interpretation, punitive damages are not encompassed by the exclusion, because those damages are received, not because of a personal injury, but in large part "on account of" a defendant's egregious conduct and the jury's desire to punish and deter such conduct.

Reese, 24 F. 3d at 230-31.[13]

Thus, "[s]ection 104(a)(2) could mean that all damages recovered in a personal injury suit are excluded, or it could mean that only those damages that purport to compensate the plaintiff for the personal injury suffered are received on account of personal injury." *Wesson*, 48 F.3d at 897. Because the phrase "on account of personal injury" is ambiguous, we must ascertain what Congress intended. In doing so, we look to the design and language of the statute as a whole, as well as to external aids that may reveal Congress' intent. *See Crandon v. United States*, 494 U.S. 152, 158 (1990).

13. Similarly, *Miller* explained that "on account of" suggests causation, but that causation could be either "but for causation" — i.e., the plaintiff would not have recovered punitives but for the injury, or it could be sufficient causation — e.g., personal injury alone does not sustain a punitive damages award, a plaintiff must also show egregious conduct. *Miller*, 914 F.2d at 589-90.

The title of § 104, "Compensation for injuries or sickness," suggests that Congress intended "to exclude [from gross income] damages which *compensate* a taxpayer for injuries." *Hawkins*, 30 F.3d at 1083 (emphasis added). All of the subsections of § 104 address replacement for losses resulting from injury or sickness, and thus are compensatory in nature.[14] Read in context, then, § 104(a) (2) logically addresses compensatory payments. *Reese*, 24 F.3d. at 231 (citing *King v. Saint Vincent's Hosp.*, 502 U.S. 215, 221 (1991) ("meaning of statutory language, plain or not, depends on context")). This restrictive reading of § 104(a) (2) is bolstered by "the default rule of statutory interpretation that exclusions from income must be narrowly construed." *Schleier*, 115 S. Ct. at 2163 (quoting *Burke*, 504 U.S. at 248).

We also look to the legislative history to construe an ambiguous statutory phrase. *See Haggar Co. v. Helvering*, 308 U.S. 389, 394 (1940) (statute must be construed in light of legislative purpose). The Federal Circuit extensively discussed the legislative history of § 104(a)(2) in *Reese*, 24 F.3d at 232-33. The predecessor statute to § 104, § 213(b)(6) of the Revenue Act of 1918, was enacted because:

> Under the present law it is doubtful whether amounts received through accident or health insurance, or under workmen's compensation acts, as compensation for personal injury or sickness, and damages received on account of such injuries or sickness, are required to be included in gross income. The proposed bill

14. "Section 104(a) (1) exempts amounts received under workmen's compensation acts; section 104(a) (3) exempts amounts received through accident or health insurance; section 104(a) (4) exempts amounts received as a pension, annuity, or similar allowance for personal injuries or sickness; and section 104(a) (5) exempts amounts received as disability income." *Reese*, 24 F.3d at 231.

> provides that such amounts shall not be included in gross income.

H.R. Rep. No. 767, 65th Cong. 2d Sess. 9-10 (1918) (quoted in *Reese*, 24 F.3d at 233). The Federal Circuit concluded that the § 104 exclusions are based on the theory of "conversion of capital assets," and that "it would be inconsistent with the legislative history to treat punitive damages as excludable form income, since punitive damages in no way resemble a return of capital." 24 F.3d at 233 (citing *Glenshaw Glass*, 348 U.S. at 432 n.8 ("The long history of departmental rulings holding personal injury recoveries nontaxable on the theory that they roughly correspond to a return of capital cannot support exemption of punitive damages. . . . Damages for personal injury are by definition compensatory only.")).

Other circuits have found the idea that § 104(a)(2) is limited to compensatory damages consistent with the supposed underlying purpose of § 104 to make the taxpayer whole. *See, e.g., Hawkins*, 30 F.3d at 1083-84. However, this rationale is somewhat problematic. If, for example, a plaintiff recovers for wages lost due to his being injured in an accident, that amount would be excludable from gross income under §104(a)(2), and thus not taxable. But if he had actually worked his wages would be reportable income subject to taxes; thus the § 104(a)(2) exclusion has made him more than whole. *See Hawkins*, 30 F.3d at 1087 (Trott, J., dissenting).

We are further troubled by the language of the 1989 amendment to § 104(a)(2), effective after the instant case was brought, but surely bearing on the question of congressional intent. The amendment added the provision that "Paragraph (2) shall not apply to any punitive damages in connection with a case

not involving physical injury or physical sickness." The taxpayers contend that this amendment, which uses narrowing language, compels the conclusion that punitive damages were excludable under § 104(a)(2) before the amendment.

> Revised section 104 utilizes a double negative. . . . Since punitive damages in a case not involving physical injury or physical sickness are singled out as being includable in gross income, the clear implication of Congress' phraseology is that punitive damages in a case involving physical injury or physical sickness are excludable, and were excludable even before the amendment.

Horton, 33 F.3d at 631 n.12; *see also Hawkins*, 30 F.3d at 1086-87 (Trott, J., dissenting) (stating that if punitive damages were taxable before and after the amendment, as Ninth Circuit majority held, the amendment was meaningless because punitive damages were already taxable).[15]

The Ninth and Fifth Circuits have rejected this argument, pointing out that " 'Congress may amend a statute simply to clarify existing law, to correct a misinterpretation, or to overrule wrongly decided cases.' " *Wesson*, 48 F.3d at 901 quoting *Hawkins*, 30 F.3d at 1082). These courts reasoned that Congress adopted the amendment in part to overrule then-recent cases which held that damages received in on-physical injury cases

15. Another way to read the amendment is to assume all punitive damages were taxable before 1989 and the amendment was intended to exclude from gross income punitives in physical injury cases. However, if that was the case, Congress could simply have amended § 104 to read: "[p]unitive damages in cases involving physical injury or sickness are excludable." *Hawkins*, 30 F.3d at 1087 (Trott, J. dissenting).

were excludable under § 104(a)(2). *See Threlkeld v. Commissioner*, 848 F.2d 81, 83-84 (6th Cir. 1988); *Roemer v. Commissioner*, 716 F.2d 693, 700 (9th Cir. 1983); *see also Miller v. Commissioner*, 93 T.C. 330 (1989) (later reversed, *Commissioner v. Miller*, 914 F.2d 586 (4th Cir. 1990)).

The legislative history of the 1989 amendment indicates the original House of Representatives bill would have made all damages received in non-physical injury cases taxable. *See* H.R. Rep. No. 101-247, 101st Cong., 1st Sess. at 1354-55, *reprinted in* 1989 U.S.C.C.A.N. at 1906, 2824-25. The Senate refused to pass the House version, and the final bill was a compromise. *See* H.R. Rep. No. 101-386, 101st Cong., 1st Sess. at 623, *reprinted in* 1989 U.S.C.C.A.N. at 3225-26. It is apparent to us that when Congress was debating the amendment it believed that § 104(a)(2) applied to punitive as well as compensatory damages. As the *Hawkins* court pointed out, however, even if that was what Congress believed, it does not "indicate that Congress gleaned the true intent of previous Congressess, only that Congress was aware that courts had recently so interpreted the section." *Hawkins*, 30 F.3d at 1082 n.6. Further, if Congress was concerned primarily with non-physical injury cases, it simply may not have considered punitive damages received in physical injury cases or it may have been " 'deferring to the courts' " on this issue. *Id.* at 1082 n.7 (citation omitted).[16] The Ninth Circuit expressed doubt, given its belief that excluding punitive damages is inconsistent with § 104(a)(2)'s title and purpose, that Congress intended to exclude any noncompensatory punitive damages. However, that court "express[ed] no opinion on the excludability of punitive damages received after 1989 in physical injury cases," and

16. The court also stated that "even if the 1989 amendment makes punitive damages received in physical injury cases excludable, this implication could be inadvertent." 30F.3d at 1082 n.7.

expressed a "hope that Congress will shortly clear up the issue." *Id.*

We believe that using the amendment to interpret Congress' intent in 1954 (or 1918) is a questionable practice, particularly because of the long lapse of time and because the legislative history of both the original statute and the amendment are not enlightening. *See Wesson*, 48 F.3d at 901 ("'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one'") (quoting *United States v. Price*, 361 U.S. 304, 313 (1960)). Even if we were to agree with the Sixth Circuit's *Horton* opinion that the 1989 amendment at the very least suggests punitives were excludable under § 104 before the amendment, much of its reasoning, which is similar to that of the district court in the instant case, was undermined by the Supreme Court in *Schleier*.

In sum, it is not clear whether Congress intended to exclude punitive damages from income under § 104(a)(2). Although "good reasons tug each way" in this case, we need not decide "which tug harder," because we must follow the default rule that exclusions from income are narrowly construed. *Burke*, 504 U.S. at 248 (Souter, J., concurring). We thus join the majority of the circuits that have addressed this issue in holding that § 104(a)(2) does not exclude punitive damages from income.[17]

REVERSED.

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17. Because we have determined that punitive damages are not excludable from income, we need not address Kelly O'Gilvie's argument that interest on the portion of punitive damages that was subject to the remittitur constituted a punitive damages award.

APPENDIX B — TENTH CIRCUIT COURT OF APPEALS JUDGMENT IN *O'GILVIE V. UNITED STATES* FILED OCTOBER 18, 1995

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 94-3004
94-3031

KELLY M. O'GILVIE,

Plaintiff-Appellant
and Cross-Appellee,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee
and Cross-Appellant.

No. 94-3058

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

KEVIN M. O'GILVIE, STEPHANIE L. O'GILVIE,

Defendants-Appellees.

Appendix B

JUDGMENT
Entered September 19, 1995

Before MOORE and LOGAN, Circuit Judges, and DAUGHERTY*, District Judge.

* The Honorable Frederick A. Daugherty, Senior Judge, United States District Court for the Western, Eastern and Northern Districts of Oklahoma, sitting by designation.

This cause came on to be heard on the record on appeal from the United States District Court for the District of Kansas, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is reversed. The cause is remanded to the United States District Court for the District of Kansas for further proceedings in accordance with the opinion of this court.

[stamped]
A true copy
Teste
Patrick Fisher
Clerk, U.S. Court of
Appeals, Tenth Circuit
By s/ L. Balzano
Deputy Clerk

Entered for the Court
PATRICK FISHER, Clerk

By: s/ L. Balzano
Deputy Clerk

APPENDIX C — UNITED STATES DISTRICT COURT, DISTRICT OF KANSAS, MEMORANDUM AND ORDER IN *O'GILVIE V. UNITED STATES* FILED AUGUST 26, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

CIVIL ACTION
No. 90-1075-B

Kelly M. O'Gilvie

Plaintiff,

v.

United States of America

Defendant.

MEMORANDUM AND ORDER

This matter comes before the court on O'Gilvie's motion for reconsideration (Doc. 28) of the court's May 26, 1992 order granting summary judgment to the government. The court held O'Gilvie's punitive damages award was not excluded from income tax under 26 U.S.C. § 104(a)(2), which provides in relevant part that "gross income does not include —

"(2) the amount of any damages received . . . on account of personal injuries . . . "

O'Gilvie contends the recent decision of the United States Supreme Court in *U.S. v. Burke*, 60 U.S.L.W. 4404 (U.S. May 26, 1992) has altered the analysis used by this court in arriving at its

decision and requires the decision to be reversed. Additionally, O'Gilvie contends this court misapprehended his position on the applicability of the 1989 amendments to § 104(a)(2)

The issue decided by the Supreme Court in *Burke* was "whether a payment received in settlement of a backpay claim under Title VII . . . is excludable from the recipient's gross income under § 104(a)(2)." *Id.* The Court first explained that the term "personal injuries" is linked to the existence a tort claim against the payor. *Id.* at 4405. Thus, the taxpayers were required to show that Title VII, the legal basis for their recovery of backpay, redressed a tort-like personal injury. The Court analyzed the remedies[1] available to persons subjected to unlawful discrimination under Title VII and found nothing in the statute's remedial scheme that compensated a plaintiff for any of the traditional harms associated with personal injury. *Id.* at 4406-07. Accordingly, the Court held Title VII claims did not redress tort-like personal injuries within the meaning of § 104(a)(2) and therefore the award under Title VII was *includable* as gross income. *Id.* at 4407.

In our previous order, this court focused on the nature of the punitive damage award itself, rather than the nature of the underlying claim. In light of *Burke*, we believe our focus was misplaced. The Supreme Court's opinion makes clear that the proper inquiry for purposes of § 104(a)(2) is on the nature of the claim underlying the taxpayers' damages award. *Id.* at 4406. As we recognized in our previous order, the underlying suit giving rise to O'Gilvie's recovery of punitive damages is indisputedly tortlike in nature. Slip opinion at 3. Accordingly, the court

1. The court noted that remedial principles figure prominently in the definition of torts. *Id.* at 4405.

believes its previous order is contrary to *Burke* and must be reversed.

O'Gilvie also argues this court mistakenly believed he agreed the 1989 amendment was inapplicable. The court noted in footnote 2 of its order that the amendment became effective on July 10, 1989. Both O'Gilvie and the government agree the punitive damage award was received prior to that date. The parties thus agreed the amendment does not *apply* to this case.

The court understands O'Gilvie's argument to be that the amendment served to confirm his position that the punitive damage award is not includable in gross income. In *Burke*, the Supreme Court noted: "Congress' 1989 amendment to § 104(a)(2) provides further support for the notion that 'personal injuries' includes physical as well as non-physical injuries . . . At the same time, Congress amended § 104(a)(2) to allow the exclusion [from gross income] of punitive damages only in cases involving 'physical injury . . . ' " *Id.* at 4406, n. 6. While this *dicta* appears to support O'Gilvie's position, it is unnecessary to resolve the applicability of the 1989 amendments in view of this court's decision on reconsideration.

The motion for reconsideration (Doc. 28) is hereby granted and O'Gilvie's motion for summary judgment (Doc. 15) is sustained.

IT IS SO ORDERED.

At Wichita, Kansas, this 26th day of August, 1992.

s/ Monti L. Belot
Monti L. Belot
United States District Judge

APPENDIX D — UNITED STATES DISTRICT COURT, DISTRICT OF KANSAS, MEMORANDUM AND ORDER IN *O'GILVIE V. UNITED STATES* FILED MAY 26, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

CIVIL ACTION

No. 90-1075-B

Kelly M. O'Gilvie

Plaintiff,

v.

United States of America

Defendant.

MEMORANDUM AND ORDER

This action comes before the court on the government's motion for summary judgment (Doc. 13) and O'Gilvie's cross-motion for summary judgment (Doc. 15).

FACTUAL BACKGROUND

O'Gilvie's wife died of "toxic shock syndrome" in 1983. O'Gilvie commenced a wrongful death action against Playtex International, Inc. and eventually recovered a punitive damage award in the amount of $2,483,646.00. O'Gilvie included that amount in his 1988 gross income and paid federal income tax on the punitive damages award in the amount of $695,415.00. He subsequently filed an amended return, seeking a refund of the

taxes paid on the punitive damages award. O'Gilvie received no word from the Internal Revenue Service within six months whether his refund claim was allowed, and filed this suit. The question presented is whether the portion of a personal injury damage award attributable to punitive damages is excludable from gross income pursuant to 26 U.S.C. § 104(a)(2).

Summary judgment is appropriate when the moving party can demonstrate that there is no genuine issue of material fact and is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); Fed. R. Civ. P. 56(c). There are no disputed issues of fact.[1] The only issue is one of law.

Under the Internal Revenue Code, gross income means "all income from whatever source derived". 26 U.S.C. § 61(a). All accessions to wealth are presumed to be gross income unless the taxpayer can show that the accession falls within a specific exclusion under the Code. *Burke v. U.S.*, 929 F.2d 1119, 1121 (6th Cir. 1991). Section 104(a)(2) excludes from gross income "the amount of any damages received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal injuries or sickness . . ."[2]

---

1. O'Gilvie points out that the government's motion (Doc. 13), does not comply with local rule 206 in that it does not set forth a statement of uncontroverted facts. While the court has not overlooked this deficiency, it is plain from reading the parties' motions that no facts are in dispute and that neither parties' interests will be served by requiring the government to comply with the rule.

2. Congress amended § 104(a)(2) to add the following sentence: "Paragraph (2) shall not apply to any punitive damages in connection with a case not involving physical injury or physical sickness." Omnibus Budget Reconciliation Act of 1989, Pub.L. No. 101-239, § 7641, 1989 U.S.Code Cong. & Admin. News (103 Stat.) 2106, 2379. The amendment became effective on July 10, 1989. The parties agree the amendment is not applicable to the case at bar.

In order to determine whether a specific damage award falls within the § 104(a)(2) exclusion,[3] the court must examine whether the injury and claim are personal and tort-like in nature, and not the consequences that resulted from the injury. *Burke*, 929 F.2d at 1121; *See Wulf v. City of Wichita*, 883 F.2d 842, 872-73 (10th Cir. 1989).

Our inquiry must begin with consideration of the Kansas law that created O'Gilvie's entitlement to relief. *See Roemer v. Commissioner*, 716 F.2d 693, 697 (9th Cir. 1983) (look to state law that creates plaintiff's entitlement to relief). The underlying suit giving rise to O'Gilvie's recovery of punitive damages is indisputedly a tort action. Under Kansas law, punitive damages are recoverable in tort actions, not to compensate the plaintiff, but to punish the tortfeasor for its malicious, vindictive, or willful and wanton invasion of another's rights, and with the ultimate purpose of restraining and deterring others from acting in a similar manner. *Wisker v. Hart*, 244 Kan. 36, 41, 766 P.2d 168 (1988); *Bowman v. Doherty*, 235 [illegible] 870, 882, 686 P.2d 112 (1984); *See also* K.S.A. 603701 *et seq*. (making it clear that a principal purpose of punitive damages is to punish and deter misconduct).

O'Gilvie argues the plain language of the statute makes clear that *any* damages received as a result of the underlying personal injury lawsuit are excludable. Additionally, he argues that the statutory amendment making § 104(a)(2) inapplicable to any punitive damages received in connection with a case not involving physical injury suggests that the exclusion does apply to punitive damages received in connection with a case involving physical injury. The government, on the other hand, argues

3. Treasury regulations define a claim for person injuries under § 104(a)(2) as one which is based upon "tort or tort-type rights." 26 C.F.R. § 1.104-1(c) (1990).

punitive damages are not received "on account of" personal injuries, but rather for the purpose of deterring and punishing a wrongdoer.

Other courts have considered this issue. In *C.I.R. v. Miller*, 914 F.2d 586 (4th Cir. 1991), Miller brought suit for defamation and intentional infliction of emotional distress. She obtained a judgment of $500,000 in compensatory damages and $450,000 in punitive damages. Miller thereafter negotiated a settlement with the defendants, and eventually received as net settlement proceeds $525,000. Relying on § 104(a)(2), she did not include any part of the $525,000 on her tax return. The government challenged Miller's position on the grounds that § 104(a)(2) should be interpreted to exclude from gross income only compensatory damages, and not punitive damages. The Tax Court rejected the government's position, reasoning that the plain meaning of the words "any" and "on account of" indicated punitive damages were within the ambit of § 104(a)(2). *Miller v. Commissioner*, 93 T.C. 330, 337-41. The government appealed to the Court of Appeals, which reversed the Tax Court.

The Court of Appeals rejected the Tax Court's conclusion that the plain meaning of § 104(a)(2) compelled exclusion of punitive damages from gross income. While it agreed that the phrase "on account of" suggested causation, the court believed the Tax Court had smoothed over the distinction between "but-for" causation and "sufficient" causation. 914 F.2d at 589. Under the former approach, punitive damages arise "on account of" because of the fact that a plaintiff has to sustain a personal injury as a prerequisite to an award of punitive damages. Under the latter approach, the fact that a personal injury is a prerequisite to punitive damages does not lead to the conclusion that punitive damages are "on account of" plaintiff's injuries because personal

injury alone does not sustain an award of punitive damages. 914 F.2d at 589-90. A plaintiff seeking punitive damages must also show egregious conduct by the defendant.

Finding that § 104(a)(2) was ambiguous, the court resorted to two extrinsic aids to interpretation. First, it recognized the principle that exclusions to income are to be construed narrowly, and felt inclined to adopt the government's more restrictive view of the types of damages excludable from gross income. 914 F.2d at 590. Second, it believed the government's interpretation was more consistent with the underlying purposes of the statute. The purpose was to assist taxpayers burdened with sickness or injury and make them whole from a previous loss of personal rights. Punitive damages, however, do not compensate a plaintiff for any harm suffered but instead represent a windfall recovery. 914 F.2d at 590-91.

Applying these two principles, the Court concluded Miller's settlement proceeds, to the extent they represented punitive damages, were a windfall over and above any award of compensatory damages and did not come within the exclusion of § 104(a)(2).

The court in *Kemp v. C.I.R.*, 771 F. Supp. 357 (N.D. Ga. 1991), agreed with this analysis. In *Kemp*, the plaintiff recovered punitive damages in a § 1983 action. Although the court agreed that plaintiff's damages were derived from a tortious injury, it held punitive damages were not awarded "on account of" such injury and therefore constituted gross income pursuant to § 61(a). 771 F. Supp. at 359.

In *Roemer v. C.I.R.*, 716 F.2d 693 (9th Cir. 1983), the court reached a different result. The taxpayer received an award of

punitive damages in a defamation lawsuit. The court held the punitive damages were excludable from gross income, relying on the Commissioner's 1975 interpretation of § 104(a)(2). 716 F.2d at 700. The Commissioner subsequently reversed his 1975 interpretation and determined that punitive damages awards are includable in gross income. Rev. Rul. 84-108, 1984-29 I.R.B. 5.

O'Gilvie acknowledges the existence of contrary authority, but relies on *Burke v. U.S., supra,* and *Burford v. United States,* 642 F. Supp. 635 (N.D. Ala. 1986), to support his argument that punitive damages are excluded from gross income. In *Burke,* the taxpayers brought an action seeking refunds of taxes withheld from payments taxpayers received from their employer in settlement of a sex discrimination suit under Title VII. The court framed the issue[4] as "whether damages received in a settlement agreement in a Title VII action for sex discrimination are excludable as damages for 'personal injury' under Internal Revenue Code 5 104(a)(2)". 929 F.2d at 1120-21. The court undertook an extensive discussion of whether discrimination suits under Title VII fall within the category of suits for personal injury triggering application of § 104(a)(2). It concluded plaintiffs claim represented a "personal injury" within the ambit of the statute and that the withholding of federal taxes from the Title VII settlement was improper. 929 F.2d at 1123-24. The court did not address the issue of punitive damages and their treatment under § 104(a)(2).[5]

4. The court expressly noted: "We see the question presented to us in this appeal as a quite narrow one."

5. O'Gilvie places reliance on the following discussion in *Burke*: "[F]or the purposes of § 104(a)(2), this court [must] determine whether the injury is personal and the claim resulting in the damages is tort-like in nature. If the answer is in the affirmative, then that is 'the beginning and end of the inquiry.' (Citation omitted)

(Cont'd)

In *Burford*, the plaintiff pursued and eventually settled a wrongful death claim. She included the settlement amount on her 1984 federal income tax return, then later amended her return to exclude that amount and claim a refund.

The wrongful death proceeds recoverable under the Alabama wrongful death statute were interpreted by the courts as punitive in nature. 642 F. Supp. at 637. The government argued, as it does in the case at bar, that the proceeds were received "on account of" the magnitude of the tortfeasor's wrongful actions and not "on account of . . . personal injury." The court rejected the government's argument, but not for the reasons O'Gilvie suggests. The punitive damage provisions of the Alabama wrongful death statute had a function independent of punishing the tortfeasor. According to the court, "To contend that such proceeds are received *only because* of the tortfeasor's wrongful conduct and not because of a personal injury is neither logical nor realistic." (emphasis supplied) 642 F. Supp. at 637. The court's view of Alabama law led it to the conclusion that the damages recoverable under the wrongful death statute are the result of personal injury. 642 F. Supp. at 637-38. Thus, *Burford* does not stand for the proposition that punitive damages are excluded under § 104(a)(2).

(Cont'd)

The damages resulting from such a claim are fully excludable under § 104(a)(2). At no point do we inquire into the nature of the damages involved." 929 F.2d at 1123.

The last sentence, read out of context, suggests the court is foreclosed from considering the type of damages involved. In fact, the statement was made in the context of whether distinctions exist in the types of injuries resulting from discrimination and the appropriate compensatory damages attributable to each type.

O'Gilvie argues the recent amendment to § 104(a)(2) making the exclusion inapplicable to punitive damages received in connection with a case not involving physical injury or sickness sheds light on the pre-amendment meaning of the statute. His argument is as follows: if punitive damages were not previously excluded from gross income by the statute, then the amendment is merely a partial restatement of existing law. On the other hand, if punitive damages fell within the scope of § 104(a)(2) prior to the amendment, then the amendment merely restricts their excludability from gross income to cases involving physical personal injury. The amendment reflects a congressional judgment to partially limit the scope of § 104(a)(2) in cases where no physical injury was involved. The enactment of a meaningless amendment would not further that purpose.

The views of a later Congress are of little value when ascertaining the intent of the Congress which passed the legislation. *Mitzelfelt v. Department of Air Force*, 903 F.2d 1293, 1296 n.1 (both Cir. 1990); *Cf. Estate of Gresham v. C.I.R.*, 752 F.2d 518, 523 (D.C. Cir. 1985) (subsequent legislation is entitled to some weight in determining what a prior Congress meant). Punitive damages were not thought to be taxable income until 1955. *Commissioner of Internal Revenue v. Glenshaw Glass Co.*, 348 U.S. 426, 431 (1955). The Congress that enacted the original version of § 104(a)(2) in 1918 therefore could not have had the exclusion of punitive damages in mind. Revenue Act of 1918, § 213(b)(6), 40 Stat. 1066. Congress did not address the subject of the exclusion of punitive damage awards until the 1989 amendment.

The legislative history of the amendment indicates the House Ways and Means Committee believed the exclusion of amounts received as damages was inappropriate in cases where

no physical injury or sickness were involved. H.R. Rep. No. 247, 101st Cong., 1st Sess. 1354-55, reprinted in, 1990 U.S. Code Cong. & Admin. News 2824-25. The original bill introduced in the House would have limited § 104(a)(2) to cases involving physical injury or physical sickness. No distinction was drawn between compensatory and punitive damages. The Senate bill contained no amendment to § 104(a)(2). Under the conference agreement, Congress decided to limit recovery in cases not involving physical injury or sickness by excluding punitive damages. H.R. Conf. Rep. No. 386, 101st Cong., 1st Sess. 622-23, reprinted in, 1990 U.S. Code Cong. & Admin. News 3225-26.

It is a cardinal principle of taxation that exclusions to income are to be narrowly construed. *Miller*, 914 F.2d at 590. The court is persuaded that the government's view is a more reasonable interpretation of § 104(a)(2) and better reflects the statute's underlying purposes. O'Gilvie's punitive damage award serves no compensatory purpose and is more properly characterized as a windfall. The punitive damage award therefore was not received "on account of personal injury" and constitutes gross income under § 61(a).

The government's motion for summary judgment (Doc. 13) is granted.

IT IS SO ORDERED.

At Wichita, Kansas, this 26th day of May, 1992.

s/ Monti L. Belot
Monti L. Belot
United States District Judge

APPENDIX E — STIPULATION AND ORDER FILED AUGUST 20, 1993 IN THE UNITED STATES DISTRICT COURT, DISTRICT OF KANSAS

UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS

Civil No. 92-1358-MLB

UNITED STATES OF AMERICA,

Plaintiff,

v.

KEVIN M. O'GILVIE and STEPHANIE L. O'GILVIE,

Defendants.

STIPULATION AND ORDER

The undersigned parties hereby stipulate as follows:

1. Defendants Kevin M. O'Gilvie and Stephanie L. O'Gilvie are the children of Kelly O'Gilvie, plaintiff in *Kelly O'Gilvie v. United States*, Civil No. 90-1075-B (D. Kan.), presently pending in this Court.

2. Defendants, together with their father Kelly O'Gilvie, received $1.525 million in actual damages and $10 million in punitive damages in 1988 for the wrongful death of their mother. See *O'Gilvie v. International Playtex, Inc.*, 609 F. Supp. 817 (D. Kan. 1985), *aff'd in part and rev'd in part*, 821 F.2d 1438 (both Cir. 1987) (affirming liability verdict against defendant and reversing district court's remittitur), *cert. denied*, 406 U.S. 1032 (1988).

3. Defendant Kevin M. O'Gilvie timely filed an individual federal income tax return for the tax year 1988 which reported as income $1,241,823.00 (one million, two hundred forty-one thousand, eight hundred twenty three dollars) received from the estate of Betty O'Gilvie. Defendant Kevin O'Gilvie included the punitive-damages award in income on his 1988 federal income tax return.

4. Defendant Stephanie L. O'Gilvie timely filed an individual federal income tax return for the tax year 1988 which reported as income $1,241,823.00 (one million, two hundred forty-one thousand, eight hundred twenty three dollars) received from the estate of Betty O'Gilvie. Defendant Stephanie O'Gilvie included the punitive-damages award in income on her 1988 federal income tax return.

5. Defendants Kevin and Stephanie O'Gilvie each thereafter filed an amended federal income tax return for 1988 with the Internal Revenue Service, seeking a refund of the taxes paid on the punitive-damages award.

6. On July 9, 1990, the Internal Revenue Service refunded to Kevin M. O'Gilvie the sum of $392,160.37 (three hundred ninety-two thousand, one hundred sixty dollars and thirty-seven cents), consisting of $346,319 (three hundred forty-six thousand, three hundred nineteen dollars) in tax and $45,841.37 (forty-five thousand, eight hundred forty-one dollars and thirty-seven cents).

7. On July 9, 1990, the Internal Revenue Service refunded to Stephanie L. O'Gilvie the sum of $392,160.37 (three hundred ninety-two thousand, one hundred sixty dollars and thirty-seven cents), consisting of $346,319 (three hundred forty-six thousand,

three hundred nineteen dollars) in tax and $45,841.37 (forty-five thousand, eight hundred forty-one dollars and thirty-seven cents).

8. There are no factual issues in dispute in this litigation.

9. The sole legal issue in dispute between the parties is whether the punitive damages received by the defendants are excludable from income pursuant to 26 U.S.C. Section 104(a)(2).

10. The legal issues in this case are identical to the legal issues in the case of *Kelly O'Gilvie v. United States*, Civil No. 90-1075-B (D. Kan.), and the parties to this litigation therefore agree to be bound by the final judgment of the district court in *Kelly O'Gilvie v. United States*, Civil No. 90-1075-B (D. Kan.) (subject to the provisions contained in paragraphs 13 and 14 below).

11. If the United States prevails in this litigation, it is entitled to a judgment against each defendant in the amount of $392,160.37, plus interest according to law from July 9, 1990 until paid.

12. If defendants prevail in this litigation, they are not entitled to any affirmative relief against the United States.

13. Defendants reserve the right to renew on appeal their argument that they were not properly served with the summons and complaint in this case, in accordance with Kansas law, and that the district court accordingly lacked *in personam* jurisdiction over them.

14. Both parties reserve the right to appeal any adverse determination on the merits in this case.

s/ Linda D. King
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s/ Noreene C. Stehlik 8-12-93
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Tax Division
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Washington, D.C. 20044
(202) 514-6789
Attorney for United States

IT IS SO ORDERED.

Dated: 8-20-93

s/ Monti L. Belot
UNITED STATES DISTRICT JUDGE

OPPOSITION
BRIEF

(2)

No. 95-966

In the Supreme Court of the United States

OCTOBER TERM, 1995

KEVIN M. O'GILVIE AND STEPHANIE L. O'GILVIE, MINORS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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11PP

QUESTIONS PRESENTED

1. Whether punitive damages awarded in a personal injury suit are excluded from gross income under Section 104(a)(2) of the Internal Revenue Code as "damages received * * * on account of personal injuries or sickness" (26 U.S.C. 104(a)(2)).

2. Whether the statute of limitations for the recovery of an erroneous refund (26 U.S.C. 6532(b)) begins to run on the date that the refund check is placed in the mail or on the date that the check is received by the taxpayer.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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v.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 66 F.3d 1550. The opinion of the district court (Pet. App. 25a-27a) is reported at 71 A.F.T.R. 2d (P-H) ¶ 93-547.

JURISDICTION

The judgment of the court of appeals was entered on September 19, 1995. The petition for a writ of certiorari was filed on December 18, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners are the minor children of Kelly M. O'Gilvie and Betty O'Gilvie. Betty O'Gilvie died April 2, 1983, of toxic shock syndrome. Acting as administrator of his wife's estate and as guardian of petititoners, Kelly M. O'Gilvie brought a products liability suit against International Playtex, Inc., the manufacturer of tampons used by Betty. The jury awarded actual damages of $1,525,000 and punitive damages of $10,000,000. The trial judge ordered a remittitur, reducing the punitive damage award to $1,350,000. On appeal, however, the full award was reinstated (Pet. App. 3a).

2. In 1988, petitioners received their shares of the punitive damages award. Net of attorneys fees and expenses, each petitioner received $1,241,823. Petitioners each reported that amount as income on their separate federal income tax returns for 1988 (Pet. App. 3a). In November 1989, petitioners filed claims for refund, asserting that the punitive damages award was excluded from gross income under Section 104(a)(2) of the Internal Revenue Code as damages received "on account of personal injury" (26 U.S.C. 104(a)(2)).

The Internal Revenue Service initially approved the refund claims, and petitioners received refund checks in July 1990. Two years later, however, the United States filed an action against petitioners for recovery of erroneous refunds, asserting that the punitive damages award received by petitioners was taxable income. The parties agreed to be bound by the decision in the refund suit brought by their father, which presented the same legal question (Pet. App. 4a-5a, 8a).

3. On May 26, 1992, the district court issued a memorandum and order in the father's refund suit, holding that the punitive damages are taxable income. Upon a motion for reconsideration, however, the district court reversed itself and held that punitive damages are excludable from gross income under Section 104(a)(2) (Pet. App. 5a). The court thereafter entered a final order in petitioners' favor in the erroneous refund suit (Pet. App. 6a).

4. The court of appeals reversed (Pet. App. 1a-22a).[1]

a. The court first addressed petitioners' contention that the suit for recovery of the erroneous refund was time-barred. Under 26 U.S.C. 6532(b), an erroneous refund suit "shall be allowed only if such suit is begun within 2 years after the making of such refund." The government's complaint was filed on July 9, 1992, and alleged that the IRS refunded the taxes at issue on July 9, 1990. Petitioners admitted that they received the refund checks in the mail on July 9, 1990, but argued that a refund is made for purposes of Section 6532(b) when the check is mailed, rather than when it is received. Because the checks were mailed before July 9, 1990, petitioners asserted that the suit was filed more than two years after the refund was made.

The court of appeals noted that it previously had resolved the question whether a refund is "made" when the check is mailed or when it is received (Pet. App. 8a). In *Paulson* v. *United States*, 78 F.2d 97, 99 (10th Cir. 1935), the court had held that a tax refund is

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[1] The cases of petitioners and their father were consolidated in the court of appeals. Pet. App. 3a-7a. Their father has filed a separate petition for a writ of certiorari from the judgment of the court of appeals in the consolidated case (No. 95-977).

made "when the check in payment of the obligation is delivered." The court noted that its decision in *Paulson* is supported by this Court's decision in *United States* v. *Wurts*, 303 U.S. 414, 417-418 (1938), which held that the Commissioner's signature on a refund check does not finally establish a right to a refund, for he could later cancel the payment "even after a check was signed and mailed." The court of appeals therefore held that the government's suit for recovery of the erroneous refunds was timely (Pet. App. 8a-10a).

b. The court of appeals then turned to the question whether a punitive damages award in a personal injury action is excluded from income under Section 104(a)(2) of the Code. The court noted that four other circuits have held that punitive damages in personal injury cases are not excludable under Section 104(a)(2) (Pet. App. 13a, citing *Wesson* v. *United States*, 48 F.3d 894 (5th Cir. 1995); *Hawkins* v. *United States*, 30 F.3d 1077 (9th Cir. 1994), cert. denied, 115 S. Ct. 2576 (1995); *Reese* v. *United States*, 24 F.3d 228 (Fed. Cir. 1994); *Commissioner* v. *Miller*, 914 F.2d 586 (4th Cir. 1990)). The court observed (Pet. App. 14a-16a) that the one circuit that held to the contrary (*Horton* v. *Commissioner*, 33 F.3d 625, 630 (6th Cir. 1994)) based its conclusion upon an interpretation of this Court's decision in *United States* v. *Burke*, 504 U.S. 229 (1992), which this Court subsequently rejected in *Commissioner* v. *Schleier*, 115 S. Ct. 2159 (1995). In *Schleier*, this Court stated that (Pet. App. 16a, quoting 115 S. Ct. at 2167):

> the plain language of § 104(a)(2), the text of the applicable regulation, and our decision in *Burke* establish two independent requirements that a taxpayer must meet before a recovery may be excluded under § 104(a)(2). First, the taxpayer must demonstrate that the underlying cause of action giving rise to the recovery is "based upon tort or tort type rights"; and second, the taxpayer must show that the damages were received "on account of personal injuries or sickness."

By contrast, the court of appeals in *Horton* "misconstrued *Burke* as holding that § 104(a)(2) required *only* that there be a tort-type injury" (Pet. App. 16a).

The court of appeals noted that the statutory requirement that damages be received "on account of" personal injuries is subject to more than one interpretation: It could be read to refer broadly to any award received in a personal injury suit; or it could be read more narrowly to refer only to damages awarded "on account of" the injury itself and not to damages awarded "on account of" the "egregious" or malicious nature of the conduct of the defendant (Pet. App. 17a, quoting *Reese* v. *United States*, 24 F.3d at 230-231)). Finding nothing in the history of the statute that made clear whether Congress intended to exclude punitive damages from income under Section 104(a)(2), the court of appeals applied the settled rule that exclusions from income are to be narrowly construed and held that punitive damages are therefore not excludable from income under Section 104(a)(2) (Pet. App. 22a, citing *United States* v. *Burke*, 504 U.S. at 248 (Souter, J., concurring)).

ARGUMENT

1. The holding of the court of appeals that punitive damage awards are not excluded from income under Section 104(a)(2) of the Internal Revenue Code is correct for the reasons elaborated at length by the

court of appeals in this case, in the consistent decisions of the Fourth, Fifth, Ninth and Federal Circuits (see page 4, *supra*) and in the brief on the merits filed by the Commissioner in *Commissioner* v. *Schleier*, No. 94-500, at 25-35.[2] Since this Court issued its decision in *Schleier*, every court of appeals that has addressed this issue has held that punitive damages are not excluded from income under this statute.[3] Moreover, following the decision in *Schleier*, this Court denied a petition for a writ of certiorari presenting this same issue last Term in *Hawkins* v. *United States*, *supra*. The petition in this case should be denied for the same reasons. See note 3, *supra*.

2. Petitioners assert (Pet. 20-27) that the government's complaint in this case is barred by the applicable statute of limitations. Section 6532(b) of the Internal Revenue Code provides that suit for the recovery of an erroneous refund is to be brought within two years "after the making of such refund" (26 U.S.C. 6532(b)). Petitioners contend that a refund is "made" when the refund check is placed in the mail, rather than when the check is received and cashed by the taxpayer. Under petitioners' proposed interpre-

[2] We are providing petitioners with a copy of that brief and also with the reply brief filed by the government in that case which, at pages 18-20, discusses this same issue.

[3] The Sixth Circuit has not yet had the opportunity, following this Court's decision in *Schleier*, to reconsider that circuit's decision in *Horton* v. *Commissioner*, *supra*. Until that occurs, it is most doubtful that the conflict initially created by the *Horton* decision remains in existence. See Pet. App. 16a ("*Schleier* made plain that *Horton* * * * misconstrued *Burke*.").

tation of the statute, the complaint in this case would be untimely (Pet. App. 8a).

Petitioners' contention is wrong for the reasons explained by the court of appeals (Pet. App. 8a-10a). A tax refund is "made" when the refund is delivered to the taxpayer, not when it is placed in the mail. *Paulson* v. *United States*, 78 F.2d at 99. As this Court stated in *United States* v. *Wurts*, *supra*, the signing and mailing of a refund check does not establish a right to a refund because the Commissioner could later cancel the payment, "even after a check was signed and mailed." 303 U.S. at 417-418.

Petitioners err in contending (Pet. 20-21) that the decision in this case conflicts with this Court's decision in *United States* v. *Wurts*. The issue in *Wurts* was whether the two-year period for bringing a suit for an erroneous refund, which begins upon the "making" of the refund, begins when the refund is administratively allowed, or when it is paid. 303 U.S. at 415. The suit had been brought within two years after the refund check was mailed, but more than two years after the refund was approved by the Commissioner. The Court observed that words in statutes are to be given their common meaning, and the common meaning of "refund" is "to return (money) in restitution, repayment." *Id.* at 417. The Court noted that administrative allowance of a refund "does not finally establish a claimant's right to a refund and does not preclude further investigation and consideration of the claim." *Ibid.* The Court explained that a refund could still be cancelled "even after a check was signed and mailed." *Id.* at 417-418. The Court therefore held that the statute of limitations runs from the date of payment. *Ibid.*

As the court of appeals stated in this case (Pet. App. 9a), *Wurts* does not support petitioners' argument. Instead, *Wurts* plainly states that a refund has not yet been "made" even when the check has been placed in the mail. As other courts have consistently held, a refund is made within the meaning of Section 6532(b) only when the refund is actually received by the taxpayer. See *United States* v. *Carter*, 906 F.2d 1375 (9th Cir. 1990); *Paulson* v. *United States*, *supra*. There is no conflict among the circuits or other reason warranting further review of this issue by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1996